IN THE

Supreme Court of the United States

OCTOBER TERM— 1950

No. 8

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
an unincorporated association,
Petitioner,

v.

J. HOWARD McGRATH, Attorney General
of the United States, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

O. JOHN ROGGE,
BENEDICT WOLF,
Attorneys for Petitioner.

MURRAY A. GORDON,
ROBERT H. GOLDMAN,
JEROME J. BORNSTEIN,
Of Counsel.

INDEX

Cases Cited

STATUTES

TREATISES

ARTICLES

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM—1949

No.

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
an unincorporated association,

Petitioner,

v.

J. HOWARD MCGRATH, Attorney General
of the United States, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable the Chief Justice of the Supreme Court and the Associate Justices of the Supreme Court of the United States:

The petitioner herein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia affirming the dismissal of the complaint and the denial of petitioner's motion for a preliminary injunction by the United States District Court for the District of Columbia.

Statement of the Matter Involved

The instant action was brought for declaratory and injunctive relief by the Joint Anti-Fascist Refugee Committee (hereinafter sometimes referred to as "JAFRC"), an unincorporated association located in New York City, N. Y., against Tom C. Clark, Attorney General of the United States,* Seth W. Richardson, Chairman of the Loyalty Review Board of the Civil Service Commission, and the rest of the members of that Board. Respondents were named in their capacity as individuals. Petitioner sought to remedy and enjoin the action of respondents taken pursuant to Executive Order 9835, the so-called "Loyalty Order," which the petitioner declares to be unconstitutional.

The first cause of action alleges that the JAFRC has conducted relief activities, under governmental supervision (R. 3), since its inception in 1942, for the benefit of anti-fascist refugees who had fought with and assisted the duly constituted Government of Spain in its opposition to the efforts of Francisco Franco to overthrow that Government by armed force (R. 4). The JAFRC assisted in the release of such refugees from concentration camps and arranged for their transportation, asylum and other aid; and at the present time the JAFRC is principally devoted to aiding such anti-fascist refugees by supplying them with money, food, clothing, and medical assistance (R. 4, 15-25). A total of $1,011,448.00 in cash and $217,903.00 in kind was disbursed by the JAFRC from 1942 through 1947 for relief (R. 4). The funds for these relief activities were raised at social affairs, rallies, meetings, dinners, theatre parties, etc., conducted by the JAFRC, so that petitioner's ability

* By an order of the Court of Appeals for the District of Columbia dated and filed October 14, 1949, J. Howard McGrath, Attorney General of the United States, was substituted as a party appellee herein in the place and stead of appellee Tom C. Clark (R. 50).

to carry on its relief work is based upon the good will of the American people, which it has enjoyed (R. 4-5).

The petitioner's work has been and will continue to be seriously and irreparably damaged by actions of the respondents purportedly performed pursuant to Executive Order 9835 (R. 5). That Order was issued on March 25, 1947 and recited that it was based upon the President's constitutional powers and upon powers delegated by the Congress (R. 5). The stated purpose of Executive Order 9835 was to establish standards and machinery for determining the loyalty of federal civil service employees and applicants (R. 5). It provided for the establishment of the Civil Service Commission Loyalty Review Board which was to be furnished by the Department of Justice with, and was to disseminate to all departments and agencies, the name of each foreign or domestic organization, association, movement, group, or combination of persons which the Attorney General, after "appropriate investigation and determination," designates as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States or as seeking to alter the form of government of the United States by unconstitutional means" (R. 5-6). Membership in, affiliation with, "or sympathetic association with any" such designated "organization, association, movement, group or combination of persons" could, under the Order, "be considered in connection with the determination of disloyalty" (R. 5-6).

On November 24, 1947, in a letter to the respondent Seth W. Richardson, the then Attorney General Tom C. Clark listed the petitioner, among 90 organizations, as "subversive," although petitioner never received any notice or hearing concerning such designation (R. 6), and on December 4, 1947, the respondent Richardson released that letter to be publicized (R. 7).

The publication of that letter caused petitioner serious injury. As a direct result of the dissemination of the designation of the petitioner as "subversive": the Bureau of Internal Revenue announced that it had revoked its ruling classifying the JAFRC as a tax-exempt organization (R. 7, 26-27); contributors, especially present and prospective civil servants, reduced or discontinued their contributions to the petitioner (R. 7, 32); licenses required for the solicitation of funds were refused the JAFRC (R. 7); meeting places and facilities necessary for the conduct of the JAFRC fund-raising activities were denied to the petitioner (R. 7, 30-33); and the taint placed by the respondents upon the JAFRC lost the organization the support of speakers, entertainers, members and other participants (R. 8, 26). In response to a letter sent by Helen R. Bryan (R. 27), the JAFRC Executive Secretary, the various local chapters in Chicago (R. 27), Seattle (R. 27), San Francisco (R. 27-28), Philadelphia (R. 28) and Boston (R. 28-30) have indicated that the injurious effect of the Attorney General's appellation of the JAFRC as "subversive" has been nationwide.

The complaint further alleges that the acts of the respondents were without warrant in law and deprived petitioner of its rights in violation of the Constitution (R. 8); and that Secton 9A of the Hatch Act and Executive Order 9835 are repugnant to the First, Fifth, Ninth and Tenth Amendments to the United States Constitution (R. 8-9).

Upon these allegations and upon the recitations of other appropriate jurisdictional requirements (R. 9), the first cause of action prays for a declaratory judgment (R. 9) and the second cause of action prays for injunctive relief (R. 9-10).

The prayer for relief is for: (1) a declaration that Executive Order 9835, and Section 9A as applied by Executive Order 9835, are unconstitutional; (2) an injunction:

(a) restraining the further dissemination by respondents of the name of petitioner as a designated organization;

(b) directing respondents to remove petitioner's name from the list of designated organizations and to make a public statement thereof;

(c) restraining respondents from taking any other action which may be based upon the inclusion of petitioner's name in the list of designated organizations; and

(3) a preliminary injunction for the same relief *pendente lite* requested in the preceding prayer for injunctive relief (R. 10-12).

Simultaneously with the service of the complaint, petitioner moved for a three-judge Court pursuant to 28 U. S. C. § 2282 and for a preliminary injunction (R. 2, 11). Respondents cross-moved to dismiss the complaint (R. 34). All the motions were argued before Judge LETTS who, after denying the application for a three-judge Court, proceeded directly to hear and consider the other motions. The motion to dismiss was granted and the injunction denied, without opinion, by order filed June 4, 1948 (R. 35). Thereafter an appeal to the United States Court of Appeals for the District of Columbia was duly instituted.

Opinion Below

The appeal in the Court of Appeals was argued on March 16, 1949, and on August 11, 1949, the ruling of the District Court was affirmed, EDGERTON, *J.*, dissenting (R. 36-48). The majority opinion, written by PROCTOR, *J.*, and concurred in by CLARK, *J.*, found that "the complaint does not present a justiciable controversy" (R. 38) for the reason that, according to the majority of the Court, the

action of the Attorney-General in designating the JAFRC was performed as the *alter ego* of the President in a matter wherein the action of the President was not subject to judicial review (R. 38) and imposed "no obligation or restraint" upon the JAFRC (R. 38) but caused the JAFRC, "at most," only indirect and incidental injury (R. 39). The majority opinion proceeded further, "in view of the number of cases in this jurisdiction attacking validity of the loyalty program" (R. 40), to state briefly its views that Section 9A of the Hatch Act (R. 40), Executive Order 9835 (R. 40), and the action of respondents complained of are valid (R. 40); and that "nothing in the Hatch Act or the loyalty program deprives the Committee or its members of any property rights. Freedom of thought and belief is not impaired" (R. 41). The dissenting opinion found that the action of the respondents was unauthorized by Executive Order 9835 because of the failure to accord petitioner notice and hearing, and beyond the scope of Section 9A of the Hatch Act because, upon the conceded allegations of the complaint, the JAFRC is not an organization comprised within the terms of said Section 9A (R. 43); that as respondents found and publicly stigmatized petitioner as "subversive" without notice or hearing, respondents' action was invalid on constitutional grounds (R. 44); that the action complained of was invalid because it impaired and abridged First Amendment rights although, upon the record before the Court, no constitutionally sufficient reason therefor appeared (R. 45); that petitioner had standing to sue for injury to its reputation, impairment of First Amendment rights, and loss of contributions resulting from respondents' actions (R. 46); and that the equity jurisdiction of the Court allowed judicial review of and relief for the action of respondents here complained of (R. 47).

The majority and dissenting opinions in the Court of Appeals have been reported at 177 F. 2d 79.

Jurisdiction

The judgment of the Court of Appeals affirming the dismissal of the complaint and the denial of petitioner's motion for a preliminary injunction was made and filed August 11, 1949 (R. 49). A petition for rehearing addressed to the Court of Appeals was denied by order dated and filed September 22, 1949 (R. 52). On motion of the petitioner herein an order was made by Mr. Chief Justice VINSON on December 12, 1949 extending the time for the petitioner to petition for writ of certiorari to and including January 25, 1950.

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code.

Statutes and Orders Involved

1. Section 9A of the Hatch Act (Act of August 2, 1939, c. 410, § 9A, 53 Stat. 1148, 5 U. S. C. A. § 118j):

> "(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.
>
> (2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person."

2. The pertinent portions of Executive Order 9835 (12 Fed. Reg. 1935):

(a) Preamble.

"NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows":

(b) Part III, Section 3.

"The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies."

(c) Part V.

"1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

Questions Presented

1. Whether Executive Order 9835, on its face and as applied herein by respondents, violates the Ninth and Tenth Amendments to the United States Constitution in that it asserts powers not delegated to the Federal Government but reserved to the people and the States by the United States Constitution.

2. Whether Executive Order 9835, on its face and as applied herein by respondents, abridges First Amendment rights of petitioner, its members and all others similarly situated in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

3. Whether Executive Order 9835, on its face and as applied herein by respondents, violates the Due Process Clause of the Fifth Amendment to the United States Constitution in authorizing the public designation of organizations as "subversive" by respondents without notice or hearing to those organizations, without any clearly defined standards to guide or delimit respondents in making such designation, without requiring any findings or conclusions to support such designation, and without according designated organizations any administrative or judicial review of that designation.

4. Whether the designation of petitioner as "subversive" together with the publication and circularization of that designation by respondents, concededly resulting in injury to the reputation of the organization and to its members, loss of contributions to and support of the organization, the denial of fund solicitation licenses to petitioner, the revocation of the organization's tax-exempt status by the Bureau of Internal Revenue, and the abridgment and impairment of the exercise of First Amendment rights by the organization, its members and all others similarly situated, presents a justiciable controversy.

5. Whether the stigmatizing designation of the JAFRC, deemed a conclusive determination in connection with the administration of Executive Order 9835 by respondents, presents a justiciable controversy.

6. Whether the stigmatizing and disseminated designation of the JAFRC by respondents is a reviewable exercise of executive power.

7. Whether the designation of the JAFRC by respondents as "subversive" and the public dissemination thereof by respondents to the injury of property and constitutional rights of petitioner and its members is a privileged official

communication with respect to which no cause of action for injunctive and other equitable relief is available.

8. Whether petitioner, an unincorporated association suing in its organizational name on behalf of all its members pursuant to Rule 17(b) (1) of the Federal Rules of Civil Procedure, has standing to assert that the action of respondents abridges property and constitutional rights of petitioner and its members in violation of the First, Fifth, Ninth and Tenth Amendments to the United States Constitution.

Specification of Errors

1. It was error for the Court of Appeals for the District of Columbia to affirm the order of the District Court granting the motion of respondents to dismiss the complaint.

2. It was error for the Court of Appeals for the District of Columbia to affirm the order of the District Court denying the motion of petitioner for a temporary injunction.

Summary of Argument

The sole, unlimited and unreviewable discretion accorded the Attorney General by Executive Order 9835 to adjudge and label organizations "subversive" without notice or hearing impairs and restrains the First Amendment rights of every individual in or contemplating federal employment; of every present or contemplated organization named, to be named, or capable of being named "subversive"; and of every person who has past, present, or contemplated membership, affiliation, or "sympathetic association" with an organization subject to designation at the pleasure of the Attorney General. This petition presents the question whether such unprecedented power

comports with the prohibitions contained in the First, Fifth, Ninth, and Tenth Amendments to the United States Constitution; that question warrants and requires consideration and adjudication by this Court in order that the right to form, to join, and to associate with organizations for the collective exercise of First Amendment activities may be definitively settled.

There is no delegation of executive power in the Constitution which authorizes Executive Order 9835. In sustaining the Executive Order which permits the Attorney General to dictate what is orthodox and proper in the area of thought, expression and association, the Court below contravened the injunction of *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642, that in no instance does the Constitution delegate such power to an official, "high or petty." Nor may Executive Order 9835 be sustained as executive action in aid of legislation for the Order is not expressly or impliedly authorized by any legislation and, indeed, is in conflict with Section 9A of the Hatch Act. And irrespective of the constitutional source which may be claimed for Executive Order 9835, the Order is invalid for on its face and as applied it punishes civil service employees for their thoughts, beliefs, expressions, and association; it subjects designated organizations and their membership to defamation, to economic loss, to loss of good will, to loss of essential privileges, to loss of membership and support; and it imposes a prior restraint upon all organizational First Amendment activities. As this cause comes before the Court upon a motion to dismiss, it is decisive that nowhere in the record herein does it appear or is it claimed that the restraints and abridgments by respondent of activities protected under the First Amendment are based upon a clear and present danger to the civil service or our national security. Moreover, the facts *dehors* the record confirm that there is no basis for the extraordinary and repressive measures here

complained of. The failure of Executive Order 9835 to require the Attorney General to grant a hearing, review, or other procedural safeguards to designated organizations further demonstrates that the Executive Order is in violation of the Fifth Amendment.

The instant cause properly raises and presents for adjudication the foregoing constitutional contentions. A justiciable controversy arose from the issuance by respondents of a defamatory blacklist which designated the petitioner-organization as "subversive." Moreover, as that list is a final and irrevocable administrative determination of the petitioner's status, for the purposes of the loyalty program, which induces present and prospective federal civil servants to sever their association with the JAFRC under threat of dismissal and proscription from federal employment, the ruling of the Court below that there is here no justiciable controversy is in conflict with the decision of this Court in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407. And the validity of the action of respondents which thus creates a justiciable controversy is the subject of judicial review as it affects private property and constitutional rights and does not involve a political question; the circumstance that the action complained of includes that of a cabinet officer purporting to exercise primary executive power is immaterial for equity jurisdiction has frequently been extended to cabinet officers and executive power is no more immune from judicial review as to constitutionality than any other form of governmental action. Nor may respondents foreclose judicial inquiry into the constitutional propriety of their blacklist by characterizing it as a privileged official communication which will not found an action in libel; the complaint seeks declaratory and equitable relief, not money damages from respondents, and, therefore, the doctrine of privileged official communication here affords no basis for a dismissal. And, finally, the applicable decisions of this Court make

plain that petitioner, an unincorporated association, has standing to raise the First Amendment issues here presented particularly since, as a matter of substantive law, petitioner represents the aggregate of the personal and property rights of its membership and sues in its organizational name only as a matter of procedural convenience pursuant to Rule 17(b)(1) of the Federal Rules of Civil Procedure.

Reasons Relied on for Allowance of Writ and Brief in Support of Petition

I

The petition herein presents "questions whose resolution will have immediate importance far beyond the particular facts and parties involved . . . tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country."*

In the last Term of the Court certiorari was granted in *Parker, et al.*, v. *County of Los Angeles, et al.*, 337 U. S. 929, where petitioners challenged the validity of test oaths required under the so-called "Loyalty Check" program adopted by the Board of Supervisors of the County of Los Angeles. The writ was granted for the reason, as stated for the Court by Mr. Justice FRANKFURTER, that "serious questions seemed raised as to the scope of a state's power to safeguard its security with due regard for the safeguards of liberty assured by the Due Process Clause of the Fourteenth Amendment." *Parker, et al.* v. *County of Los Angeles, et al.*, 338 U. S. 327, 329. Constitutional questions similar to those which "seemed raised"

* VINSON, *C. J.*, address to American Bar Association, September 7, 1949, reported at 70 Sup. Ct. XII, XIV.

in *Parker, et al.*, v. *County of Los Angeles, et al.*, are here in fact raised; but as Executive Order 9835 is national rather than local in scope, and as its impact is greater upon persons and organizations because of the prestige and power of its sponsorship and enforcement, reasons for the granting of certiorari are here even more compelling than in *Parker, et al.*; v. *County of Los Angeles, et al.*

By its terms, Executive Order 9835 establishes machinery for inquiring into the "loyalty" of the two million federal civil service employees and of the millions of present and prospective applicants for federal employment. If Executive Order 9835 entailed no more, the challenge to the constitutionality of that Order by petitioner would render this an action affecting "tremendously important principles." But as this suit demonstrates, Executive Order 9835 has a vitality beyond the confines of the federal civil service.

On the facts and on the record herein the JAFRC is a lawful organization acting through lawful means to achieve lawful objectives—yet it has been publicly designated as "subversive" by the Attorney General of the United States. Executive Order 9835 empowers that official—who has the duty to prosecute organizations which seek to overthrow our form of government—to adjudge and stigmatize, without prosecuting, an organization as "subversive." The exercise of this power is delimited by no ascertainable standards, need not be preceded by any hearing or findings, and is non-reviewable. Under Executive Order 9835, the Attorney General, absent evidence which would satisfy a judge and a jury that an organization is illegal, uses the prestige and power of his office to label that same organization as "subversive." Plainly Executive Order 9835 establishes the Attorney General as the single and final arbiter of the orthodoxy of all organized political, social and religious activity.

This power, unlimited by regular standards or procedural safeguards, not only directly impairs the activities of every organization heretofore named by the Attorney General—it restrains every group of men, brought together for common activity on behalf of a common social, humanitarian or political objective, for they must hereafter beware of offending the political sensibilities of the Attorney General.* Statutes and orders, which concern the exercise of First Amendment rights, have a force generated by their very existence even apart from their enforcement. *Thornhill* v. *Alabama*, 310 U. S. 88, 98; *Winters* v. *New York*, 333 U. S. 507, 518; see 61 *Harvard Law Rev.* 1208-1215. Executive Order 9835 on its face, and independent of its administration, operates as a prior restraint upon every individual in or contemplating federal employment; upon every organization, named, to be named or capable of being named as "subversive" by the Attorney General; and upon past, present or contemplated membership, affiliation or "sympathetic association" with an organization subject to such designation at the pleasure of the Attorney General. Executive Order 9835 thus imposes a present and continuing prior restraint on every aspect of the First Amendment rights of all the people. Accordingly, upon the determination of the constitutional issues here posited—issues not unique or indigenous to the petitioner-organization, but common to all organizations or associations formed for the collective exercise of First Amendment rights—is "based the plans, hopes, and aspirations of a great many people throughout the country."

The decision of the Court of Appeals for the District of Columbia herein was reached by a bare majority and was

* The then Attorney General Tom C. Clark, when he issued his first list, assured the House Committee on Un-American Activities that the list of designated organizations was not complete and would be augmented. *N. Y. Times*, December 9, 1947, p. 23, col. 2. Subsequently another 32 groups were named by the Attorney General on May 28, 1948 at which time he informed Richardson "that additional lists would be added from time to time." *N. Y. Times*, May 29, 1948, pp. 1, 6.

attended by the dissenting opinion of that judge of the Court of Appeals whose dissent in at least one prior instance came to be adopted as the view of this Court. See *Hurd* v. *Hodge*, 162 F. 2d 233, 235 (EDGERTON, *J.*, dissenting), rev'd. 334 U. S. 24. And subsequent to the decision of the Court below herein, legislation enacted by the State of New York similar in its basic features to Executive Order 9835—albeit providing greater procedural rights and safeguards to the organizations affected—was held to be in violation of the State and Federal Constitution. *Thompson, et al.* v. *Wallin, et al.*, 122 New York Law J. 1513 (decided Nov. 28, 1949) (Sup. Ct., Albany Cty.); *Lederman, et al.*, v. *Board of Education of the City of New York*, 122 New York Law J. ~~1667~~, ~~1668~~ (decided Dec. 14, 1949) (Sup. Ct., Kings Cty.). Commentators in the legal periodicals and elsewhere, as well as legislators (see citations set out *infra* at pp. 48-49), have expressed their doubts as to the constitutional propriety of Executive Order 9835. And as this Court has, to date, had no opportunity to pass upon the Order, there is lacking the final and definitive guidance which this Court alone can supply concerning the validity of Executive Order 9835 and related governmental action.

There are here posited unsettled issues which penetrate to the core and the limits of power and freedom in our system. Important First Amendment rights of all the people depend upon the disposition of those issues by this Court. And there is an urgency for decision by this Court; unlike legislation which affects only parties immediate to its enforcement, Executive Order 9835 operates, on its face, as a present, continuing, prior restraint of First Amendment rights. Under all the foregoing circumstances, although the power to grant certiorari herein rests, of course, in the sound discretion of this Court, the language of MARSHALL, *C. J.*, in *Cohens* v. *Virginia*, 6 Wheat. (U. S.) 264, 404, here has compelling significance:

"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them."

II

The grounds of decision assigned by the Court of Appeals for the District of Columbia are in conflict with the applicable decisions of this Court.

The variety of issues herein may be concisely paraphrased as follows:

(1) Can the Attorney General constitutionally be empowered, in the manner provided by Executive Order 9835, publicly to adjudge a legal organization to be "subversive" in the exercise of his sole and exclusive discretion? and, if not,

(2) Can an organization and its members thus designated obtain equitable relief?

The majority of the Court of Appeals for the District of Columbia answered the second question in the negative and then the first in the affirmative. In both instances the decision of the Court below was in conflict with the applicable decisions of this Court.

A

Executive Order 9835 Violates the Ninth and Tenth Amendments to the United States Constitution

It is fundamental that under the American constitutional system the Federal Government is one of enumerated powers. Authority exercised by any branch of the Federal Government must find its source either in express or implied powers granted by the United States Constitution, otherwise that authority does not exist. *McCulloch* v. *Maryland*, 4 Wheat. (U. S.) 316; *U. S.* v. *Butler*, 297 U. S. 1; *Kilbourn* v. *Thompson*, 103 U. S. 168; *Ex Parte Quirin*, 317 U. S. 1, 25-26. The foregoing principle applies and delimits the scope of governmental action even where an emergency situation obtains. *Ex parte Milligan*, 4 Wall. (U. S.) 2; *Schechter* v. *United States*, 295 U. S. 495, 528, 529. Consequently, all powers not expressly or impliedly granted to the Federal Government are reserved to the States or to the people thereof and prohibited to the Federal Government. *United States Constitution*, Amendment X. It is therefore decisive that no express or implied authorization appears in the Constitution for Executive Order 9835.

1. There is no power in any agency of Government to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . [under] any circumstances."

The normal process of constitutional adjudication involves the balancing of governmental power and individual rights. But no such balancing is here required. Under the doctrine of *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, there is no power, for there is no duty, to perform the acts complained of by the JAFRC.

Executive Order 9835 authorizes the Attorney General to designate organizations ". . . as totalitarian, fascist, communist or subversive . . ." (Part III, Section 3). It is not required that the organization be thus designated on the basis of any specified acts nor are any other limitations imposed upon the Attorney General's discretion. The Attorney General's designation is to be premised upon his evaluation of whether the ideas or opinions, about which the organization is formed, are "totalitarian, fascist, communist or subversive." The terms thus defining the organizations which may be named are so vague* that the Attorney General is virtually empowered to proscribe as "subversive" what he might find "at the moment was contrary to his . . . notions of what was good for health, morals, trade, commerce, justice or order" (*Musser* v. *Utah*, 333 U. S. 95, 97). In short, the Executive Order enables the Attorney General to define what is orthodox and proper in the area of thought, speech and association.

Such power is the subject neither of express nor implied delegation by the Constitution. It was not intended to surrender by the Constitution the "blessings of liberty" which, according to the preamble thereof, the Constitution was ordained and established "to secure." Federalist Papers, No. 84 (Hamilton). Accordingly it is the doctrine of the *Barnette* case:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *If there are any circumstances which permit an exception, they do not now occur to us*" (319 U. S., 642). (Italics supplied.)

---

* The term "subversive" was deemed vague and indefinite in *Winters* v. *New York*, 333 U. S. 507, 518, while in *Feinglass* v. *Reinecke*, 48 F. Supp. 438, a statutory test which would disallow on the ballot any "organization or group . . . associated, directly or indirectly, with Communist, Fascist, or other un-American principles" was said to be "so vague and indefinite as to make the Act invalid."

This doctrine of the *Barnette* case was reiterated in the concurring opinion of Mr. Justice JACKSON in *Thomas* v. *Collins*, 323 U. S. 516:

> "But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because *the forefathers did not trust any government to separate the true from the false for us*" (323 U. S., 545). (Italics supplied.)

And for considerations resembling closely those enunciated in *Barnette*, this Court declared that the requirement that beliefs or expressions "conform to some norm prescribed by an official smacks of an ideology foreign to our system." *Hannegan* v. *Esquire*, 327 U. S. 146, 158.

The lack of power to prescribe norms of thought, opinion, or expression constitutes the power accorded the Attorney General under Executive Order 9835 a violation of the reservation of non-delegated powers.

2. Article II, Section 2 of the United States Constitution does not authorize Executive Order 9835.

It was suggested below that the Order may be predicated upon the power of the President to ". . . require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices . . ." (*United States Constitution*, Article II, § 2).*

The power of the President to obtain information from his cabinet officers is no basis for the publication of the list

* Hamilton wrote of this Section as "a mere redundancy in the plan, as the right for which it provides would result of itself from the office." Federalist Papers, No. 74.

by the Attorney General. The Executive Order does not require or direct the Attorney General to supply the President with any information nor was the list published as a communication to the President. It may be presumed that the Attorney General has access to the President through media other than the public press. Nor can it be successfully maintained that the determination of the political orthodoxy of organizations is a "subject relating to the duties" of the Attorney General. *Thomas* v. *Collins*, 323 U. S. 516, 545; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. Executive Order 9835, patently dedicated to a purpose other than supplying the President with information, is not sustainable as an exercise of the powers delegated by Article II, Section 2. *United States* v. *Butler*, 297 U. S. 1; *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20.

3. Article II, Sections 1 and 3 of the United States Constitution do not authorize Executive Order 9835.

Respondents below referred to "primary," "inherent executive power," derived from the provision that "the executive power shall be vested in a President of the United States of America" (Article II, Section 1), as the constitutional authorization for Executive Order 9835; the Court below rested its conclusion on Article II, Section 3 wherein the President is enjoined to ". . . take care that the laws be faithfully executed . . ." Neither provision is a delegation of constitutional power authorizing Executive Order 9835.

Section 1 of Article II is no grant of power. Section 1 was included in order to assure sole rather than multiple executive leadership. Federalist Papers, No. 70.

Section 3 requires the Executive to "approve and execute" the laws of the land (*Martin* v. *Hunter's Lessee*, 1 Wheat. (U. S.) 304, 329; cf. *Ex Parte Milligan*, 4 Wall.

(U. S.) 2, 121), it does not authorize powers beyond that delegated and required by the laws of the United States.

Of course, the Executive does possess certain auxiliary powers which are vast in areas, such as the conduct of foreign affairs or the administration of war activities, where those powers are in aid of express powers granted the President by the Constitution. See, e. g., *United States* v. *Curtiss-Wright Export Corporation*, 299 U. S. 304; *United States* v. *Belmont*, 301 U. S. 324; *Ex parte Endo*, 323 U. S. 283; *Korematsu* v. *United States*, 323 U. S. 214; *Myers* v. *United States*, 272 U. S. 52. But where the auxiliary power asserted by the Executive is not in connection with any express constitutional executive power, then the circumstance of the assertion of such auxiliary power must be limited and exceptional if ours is to remain a government of enumerated powers. See, *e. g.*, *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *In re Neagle*, 135 U. S. 1; *In re Debs*, 158 U. S. 564. Nor is it here necessary to define precisely the extent of the auxiliary powers of the Executive for, at the least, neither the Executive nor any other branch of government has the express or implied power to proscribe what is good or what is bad, moral or immoral, in the fields of politics, nationalism, religion, or other matters of opinion; there is no power and no duty in any agency of government to declare what is orthodox or unorthodox in such matters. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642; *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 158; *Thomas* v. *Collins*, 323 U. S. 516, 545.

The Court below treated Executive Order 9835 as an instrumentality for the enforcement of Section 9A of the Hatch Act and, therefore, as authorized by Section 3 of Article II of the Constitution (R. 41); and the Court also suggested that Executive Order 9835 was an exercise of the inherent executive removal power (R. 40). But Executive Order 9835 is not authorized by Section 9A of

the Hatch Act and, in fact, is inconsistent with that statute. Accordingly, Executive Order 9835 is not justifiable as an implementation of Section 9A. Nor may Executive Order 9835 subsist as an exercise of the inherent executive removal power since Executive Order 9835 extends to federal employees appointed, by department heads and others, under Congressional authority (see *United States Constitution*, Article II, § 2, cl. 2), and as to such employees, the executive power does not authorize the President to employ removal standards different from those established by the Congress. *Humphrey's Executor* v. *United States*, 295 U. S. 602; *United States*, v. *Perkins*, 116 U. S. 483.

Thus, while Section 9A of the Hatch Act authorizes the removal of those employees who ". . . have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States," the Executive Order permits removal where "reasonable grounds exist for the belief that the person involved is disloyal" (Pt. V, § 1). The difference between the two standards is plain.* Note, 47 *Columbia Law Rev.* 1161, 1174. Indeed, prior to Executive Order 9835, while a conditional employee or an applicant could be disqualified by the Civil Service Commission where there was "reasonable doubt as to his loyalty to the Government of the United States" (7 Fed. Reg. 7723 (1942)), unconditionally appointed employees could not be discharged upon such grounds but only for membership in the organizations prescribed under Section 9A.

---

* In addition to the differences noted in the text, Section 9A proscribes membership in certain organizations, while the Order covers "membership . . ., affiliation . . ., or sympathetic association" (see *Bridges* v. *Wixon*, 326 U. S. 135, wherein differences in these terms are set out); moreover, Section 9A applies only to organizations which advocate "the overthrow of our constitutional form of government" and the Order includes organizations designated "as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

> "The Interdepartmental Committee** regards an employee as subject to removal only if it is established that the employee was (1) a member of an organization advocating the overthrow of the Government by force or violence, or (2) personally so advocates the overthrow of the Government by force or violence."
>
> "It is thus apparent that the Interdepartmental Committee is using a different and more technical standard than that employed by the Civil Service Commission . . . The Interdepartmental Committee points out that the standard it uses is the one required by existing legislation. It is not authorized to go beyond that standard." Subcommittee of House Civil Service Committee, Report of Investigation with Respect to Employee Loyalty, etc. (1946), p. 4; see also Report of President's Temporary Commission on Employee Loyalty (1947), pp. 7, 13.

The material variance between the standards of Executive Order 9835 and the Hatch Act is further emphasized by Section 9(a) of the latter:

> "All [federal employees] shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates" (18 U. S. C. § 118i(a)).

The civil servant who may be discharged as disloyal for "sympathetic association" with any organization which the Attorney General deems to be "subversive" does not "retain the right . . . to express [his] opinions on all political subjects and candidates."

Furthermore, as Section 9A provides that "it shall be unlawful" for federal employees to have membership in defined organizations and prescribes a sanction therefor which may be characterized as punishment under *United States* v. *Lovett*, 328 U. S. 303, a serious question exists

** This Committee dealt with unconditionally appointed government employees while the Civil Service Commission reviewed the loyalty of applicants and conditional employees.

whether the constitutional right to trial by jury in all criminal cases is here applicable or whether, in any event, a charge of violation of Section 9A so partakes of the nature of a criminal charge as to require the applicability of Fifth and Sixth Amendment safeguards.* An affirmative answer to such question would preclude the conclusion that it was intended or contemplated that the machinery established by Executive Order 9835 be set up for the purpose of adjudging guilt and assessing punishment under Section 9A. For it cannot be concluded "in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guaranties of due process of law and trial by jury are not to be forgotten or disregarded." *Lipke* v. *Lederer*, 259 U. S. 557, 562.

Executive Order 9835 is therefore not authorized by Section 9A of the Hatch Act, but, rather, is in conflict with Section 9A. Instead of supplying Executive Order 9835 with a constitutional matrix deriving from the executive power to enforce the laws, Section 9A invalidates Executive Order 9835. As Section 9A conflicts with rather than authorizes Executive Order 9835, there is absent any power delegated to the Executive by the Constitution upon which the Executive Order can be predicated. The absence of such a delegation of powers renders Executive Order 9835 invalid under the Ninth and Tenth Amendments.

---

* It is noteworthy that when first enacted Section 9A was incorporated as part of the Criminal Code at Section 611 of Title 18 of the United States Code.

B

Executive Order 9835 Violates the Fifth Amendment to the United States Constitution in That It Abridges Rights Guaranteed Under the First Amendment

It is elementary that federal executive action is limited by the Due Process Clause of the Fifth Amendment. As the scope of the protection of the Fifth Amendment is as broad as that of the Fourteenth Amendment (*Farrington* v. *Tokushige*, 273 U. S. 284, 298), the Due Process Clause of the Fifth Amendment comprises the guarantees of the First Amendment in the same manner as does the Due Process Clause of the Fourteenth Amendment. *United States* v. *Korner*, 56 F. Supp. 242. Executive action, as any other governmental action, is therefore subject to the restraints of the First Amendment. *Ex parte Endo*, 323 U. S. 283, 299, 300; see also *United Public Workers* v. *Mitchell*, 330 U. S. 75, 94, 95. And irrespective of whether Executive Order 9835 is the exercise of a power delegated to the Executive by the Constitution or by Congressional enactment, in the exercise of that power the Order violates the prohibitions contained in the Bill of Rights against governmental action which abridges speech, press or assembly.

1. The respondents' actions restrained and abridged rights under the First Amendment.

Executive Order 9835 authorizes the Attorney General, without definable or delimiting standards, to label organizations "subversive." The prior restraints inherent in the power thus granted are augmented by the circumstance that the Attorney General is authorized to act without hearings at which the charged organization may hear and refute evidence against it or present evidence on its own

behalf; without findings to indicate whether his action is based upon competent or reliable evidence; and without affording the organization designated or the civil service employee or applicant charged with "association" with the organization any opportunity otherwise to test the sufficiency of the determination made by the Attorney General.

The activities subject to the foregoing unprecedented power are First Amendment activities.

Thus the conceded allegations of the complaint recite that the JAFRC was organized, maintained, and functions to provide relief for anti-fascist refugees, particularly those refugees from Spain. Its organization and activities have been motivated by certain humanitarian and social ideals.* Those ideals constitute matters of public interest and in the realization of those ideals the constitutionally guaranteed rights of speech, press and assembly are employed.

To the extent that the respondents' actions have resulted in the inability of the petitioner to procure the facilities necessary to conduct its activities, petitioner's freedom of speech, press and assembly have been impaired by respondents. As in *Bowe* v. *Secretary of Commonwealth*, 69 N. E. 2d 115, 130, 131 (Mass.):

> "Deprived of the right to pay any sum of money for the rental of a hall in which to hold a public rally or debate, or for printing or circulating pamphlets, or for advertising in newspapers, or for buying radio time, a union['s] . . . rights of freedom of the press and of peaceable assembly would be crippled."

* Prior to the publication of the Attorney General's list, the *N. Y. Times* stated editorially: "We must hope that the new order will not be used to penalize liberals who believe in democratic Spain . . ." (March 24, 1947, p. 24, col. 2); subsequent thereto it declared ". . . we knew that communists and non-communists may personally agree up to a certain point—for instance, in their concern for refugees who dare not return to Franco Spain" (December 6, 1947, p. 14, col. 2). Cf. Hearings on H. R. 3588, 80th Cong., 1st Sess. (1947), p. 34; *Bridges* v. *Wixon*, 326 U. S. 135, 143.

The views and objectives of the JAFRC are such that its use of speech, press and assembly to express those views and to accomplish those objectives is constitutionally guaranteed by the First Amendment so that the abridgements of petitioner's speech, press and assembly occasioned by respondents must be considered in the light of the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516, 437.

The abridgement of freedom of association by respondents is even more patent. Persons are unwilling to join, support, contribute to, or otherwise participate in the activities of an organization officially labelled "subversive." Civil servants, present and prospective, may be fired or refused employment as "disloyal" for any association with the JAFRC; others "associated" with the JAFRC expose themselves to economic, social and political sanctions (see *e. g.* Bryan affidavit, R. 28-30) and may be fearful of the possibility of more serious future consequences.

The freedom of association thus impaired by respondents is the freedom of persons to gather together upon the basis of some common social or humanitarian ideal. We are "a nation of joiners." Cushman, "The President's Loyalty Purge," 36 *Survey Graphic* 283, 287. Association for the exchange of common views and objectives, and for the public presentation and support thereof has long been a vital aspect of American life. DeTocqueville, *Democracy in America* (1840), Part II, Bk. 2, c. 5; 2 Bryce, *American Commonwealth* (1924), p. 282; Wyzanski, "The Open Door and the Open Window," 36 *California Law Rev.* 336, 346. "Individuals seldom impress their views upon the electorate without organization. They have a right to organize . . . even into what are called 'pressure groups' for the purpose of advancing causes in which they believe." *Bowe* v. *Secretary of Commonwealth, supra*, at 130. One political scientist has observed:

> "Freedom of association, in short, raises issues which go to the root of the modern state. Without it no other freedom can have very much content." Laski, "Freedom of Association," 6 *Encyclopedia of Social Sciences* 447, 450 (2 ed. 1940); see also Mill, *Essay on Liberty* (1864), pp. 28, 197.

And more recently it was noted that

> "... one of the most precious of all rights, one essential to the effective operation of democracy—[is] the right of association. The practice of voluntary association is a peculiarly English and American practice. The Pilgrim Fathers associated themselves into a compact—incidentally it was a subversive one from the point of view of the English Government—and since that time Americans have customarily operated through thousands of voluntary associations: political parties, parent-teachers, veterans, business, fraternal, philanthropic, recreational, learned, and others. It is in these associations that the average American has found more training for self-government and real democracy than the famed town meeting. A policy that discourages or crushes voluntary associations will dry up the very roots of American democracy." Commager, "The Real Danger—Fear of Ideas," *New York Times Magazine*, June 26, 1949, p. 47.

The foregoing fundamental right of freedom of association is constitutionally guaranteed as are the cognate freedoms of speech, press and assembly. *Fiske* v. *Kansas*, 274 U. S. 380; *Herndon* v. *Lowry*, 301 U. S. 42; *Thomas* v. *Collins*, 323 U. S. 516; *DeJonge* v. *Oregon*, 299 U. S. 353, 365; *United States* v. *Hauck*, 155 F. 2d 141, 144; *United States* v. *Korner*, 56 F. Supp. 242, 249; cf. *United States* v. *Cruikshank*, 92 U. S. 542; see *Whitney* v. *California*, 274 U. S. 357, 371, 372. The abridgement of petitioner's freedom of association, and the restraint of the freedom of association of all other organizations, invokes the prohibitions contained in the First Amendment.

The applicability of the First Amendment is not affected by the circumstance that the Order does not in terms provide for "direct and candid efforts to stop speaking or publication as such." *Thomas* v. *Collins*, 323 U. S. 516, 547. Even if the impairment were an incident rather than the objective of the Order, this Court must nevertheless afford full deference to the prohibitions contained in the First Amendment. *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Murdock* v. *Pennsylvania*, 319 U. S. 105. In any event, the abridgements and restraints of associational freedom by respondents were intended and not merely consequential since the purpose of the publication of the list was to deter present and prospective civil servants, as well as all the people, from "associating" in any manner or fashion with designated organizations (see pp. 59, 63, *infra*). Nor can respondents argue, in fact or in law (*Thomas* v. *Collins*, 323 U. S. 516, 543), that the impairments occasioned by the Order are trivial or insubstantial. This Court is squarely confronted with the question whether the Order is compatible with the provisions of the First Amendment.

2. There is no constitutionally sufficient justification for respondents' abridgement of petitioner's rights under the First Amendment.

The constitutional prohibition of abridgement of speech, press or association extends to a grant of power to an official authorizing him to impair free expression or association. *Hannegan* v. *Esquire*, 327 U. S. 146, 151, 158; *Ex parte Endo*, 323 U. S. 283, 298; *Thornhill* v. *Alabama*, 310 U. S. 88, 97; *Lovell* v. *Griffin*, 303 U. S. 444; *Near* v. *Minnesota*, 283 U. S. 697; Chafee, *Free Speech in the United States* (2 ed. 1941), pp. 29, 309, 310. Under the decisions of this Court the infringement upon First Amendment rights may be sustained only under the most limited circumstances: the exercise of the constitutional rights abridged must

create a clear and present danger of overt action inimical to a paramount public interest.* *Schenck* v. *United States*, 249 U. S. 47; *Bridges* v. *California*, 314 U. S. 252; *West Virginia State Board of Education*, 319 U. S. 624; *Thomas* v. *Collins*, 323 U. S. 516; *Terminiello* v. *City of Chicago*, 337 U. S. 1. The presence of such a clear and present danger may not be presumed. *Thomas* v. *Collins*, 323 U. S. 516, 529; *Thornhill* v. *Alabama*, 310 U. S. 88, 96; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4. This Court must independently "weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights" *Schneider* v. *Irvington*, 308 U. S. 147, 161. Moreover, the burden of proving that a constitutionally sufficient purpose exists to justify the abridgement is upon defendants. *Busey* v. *District of Columbia*, 75 App. D. C. 352, 138 F. 2d 592.

The foregoing stringent and well-settled prerequisites imposed upon governmental action which would seek exception from the absolute prohibitions contained in the First Amendment are not here dissipated or mitigated because Executive Order 9835 ostensibly is concerned with civil service employees. For while this Court utilized the "reasonableness" rather than the "clear and present danger" test in *United Public Workers* v. *Mitchell*, 330 U. S. 75, for the determination of the constitutionality of the prohibition contained in Section 9(a) of the Hatch Act (Act of August 2, 1939, c. 410, §9(a), 53 Stat. 1148 (1939), 5 U. S. C. A. §118i) against political activities of civil service employees, the restraints and abridgements occasioned by Executive Order 9835 extend beyond political activities of civil service employees to affect the freedom of thought, expression and association of every organization labelled or capable of being labelled as "subversive" by the At-

* The clear and present danger test applies to impairments of freedom of association. *Shaw* v. *State*, 76 Okl. Cr. 271, 134 P. 999; Note, 61 *Harvard Law Rev.* 1215, 1217.

torney General and to every person associated with such an organization. The rule of the *Mitchell* case was expressly and closely confined to political *activity*; thought, expression and association were to remain entitled to the established and traditional safeguards of the First Amendment (see, *e.g.*, 330 U. S., at 99, 100). Moreover, whatever rule may obtain under the *Mitchell* case, that rule did not overrule the clear and present danger test in other circumstances* nor does it apply here where First Amendment rights of organizations and persons other than civil service employees are involved.

Upon respondents' motion to dismiss the complaint, respondents have in no wise indicated that there is any present or imminent danger to the civil service, or that petitioner—or any other designated organization—creates a clear and present danger to the Government or any other paramount public interest. Nor have respondents filed any affidavits or other papers in opposition to the petitioner's motion for a preliminary injunction. As all of the allegations of the complaint must be conceded as true upon the respondents' motion to dismiss, which is here on appeal, and as, indeed, petitioner is entitled to the benefit of every favorable inference which may reasonably be drawn from the complaint (*Ickes* v. *Fox*, 300 U. S. 82, 96), it is plain that upon the record before this Court, the respondents have failed to demonstrate the clear and present danger which alone could, under the decisions of this Court, justify respondents' abridgement of the First Amendment rights of the petitioner.

> "We think we may now hold that when legislation appears on its face to affect the use of speech, press or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their

* The clear and present danger test was employed by this Court subsequent to the *Mitchell* case in *Terminiello* v. *City of Chicago*, 337 U. S. 1; cf. *Giboney* v. *Empire Ice, etc.*, 336 U. S. 490, 503.

> existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded." *Busey* v. *District of Columbia, supra,* 138 F. 2d, at p. 595.

Moreover, the facts demonstrate that the Executive Order does not arise out of any present, existent danger to the Government and, indeed, that there is not even a reasonable basis for the wholesale screening of civil servants and, particularly, that there is no reasonable basis for according the Attorney General the power here complained of.

The Executive Order is an unprecedented grant of power.* It is a promulgation national in application which renders the Attorney General the single and final arbiter of the orthodoxy of all organized activity. Consideration of American constitutional experience indicates that only the most pressing national exigency could justify the Order.

At the conclusion of the Revolutionary War this country was young, weak and in jeopardy from internal and foreign enemies.

> "The betrayal of Washington by Arnold was fresh in mind. They were far more awake to powerful enemies with designs on this continent than some of the intervening generations have been. England was entrenched in Canada to the north and Spain had repossessed Florida to the south, and each had been the scene of invasion of the Colonies; the King of France has but lately been dispossessed in the Ohio Valley, Spain claimed the Mississippi Valley; and except for the seaboard, the settlements were sur-

* John Lord O'Brian referred to "... such unprecedented features [in the Executive Order] as the power conferred upon the Attorney General to designate *ex parte* organizations as subversive." O'Brian, "Loyalty Tests and Guilt by Association," 61 *Harvard Law Rev.* 592, 605.

> round by Indians—not negligible as enemies themselves, and especially threatening when allied to European foes. The proposed national government could not for some years become firmly seated in the tradition or in the habits of the people . . .
>
> "The forefathers also had suffered from disloyalty. Success of the Revolution had been threatened by the adherence of a considerable part of the population to the King." *Cramer* v. *United States,* 325 U. S. 1, 8-9.

And yet, under these conditions, the crime of treason was narrowly defined in the Constitution and the proof required explicitly defined (Article III, § 3) while bills of attainder were prohibited (Article I, §§ 9, 10).

Early in our history, supporters of the French Revolution were considered radicals and traitors by the Federalists and the Federalist Party enacted the Alien and Sedition Acts calculated to apply the doctrine of constructive treason to those supporters. But despite the fact that the Republicans were accused of being under the influence and in the employ of a foreign power at a time when the new Government was vulnerable to subversion, the passage of those Acts resulted in the downfall of the Federalist Party; the repeal of the Acts; and the pardoning of all those imprisoned under those Acts. Chafee, *Free Speech in the United States* (2 ed. 1941), pp. 27-28.

The Civil War engendered deep internal conflict within the nation. But not only did the Supreme Court strike down loyalty oath tests required for the practice of certain professions and practices (*Cummings* v. *Missouri,* 4 Wall. (U. S.) 277; *Ex Parte Garland,* 4 Wall. (U. S.) 333), but the Fourteenth Amendment was carefully framed to exclude from government service only those who had engaged in acts of "insurrection or rebellion" or otherwise committed treason (Amendment XIV, § 3).

Our country has been strengthened not subverted because it has chosen freedom over suppression and restraint.* If that choice brought strength when this nation was young, we should not now, as the most powerful country in the world, sacrifice the source of our moral strength and our tradition of freedom on some speculative danger. The abridgements occasioned by the Executive Order may not be justified by vague or nebulous references to subversion or revolution. It is therefore decisive that the facts available show no real danger sufficient to warrant those abridgements.

Thus the Executive Order does not recite that it is based upon any great or present threat; instead the preamble reads:

> "*Whereas, although the loyalty of by far the overwhelming majority of all Government employees is beyond question,* the presence within the government service of *any* disloyal or subversive person constitutes a threat to our democratic processes." (Italics added.)

And the report of the President's Temporary Commission on Employee Loyalty, upon which the Order was based, found not any immediate or substantial threat but the following:

> "While the Commission believes that the employment of disloyal or subversive persons presents more than a speculative threat to our present system of government, *it is unable, based on the facts presented to it, to state with any degree of certainty how far reaching that threat is* . . . The Commission is convinced that the combination of these two means (counter-espionage and a loyalty program) provides

* "Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636, 637 (JACKSON, J.).

> our best protection from a danger *which can develop into a real threat* to our national security." Report of President's Temporary Commission on Employee Loyalty (1947), pp. 21, 23. (Italics added.)

The history of the American civil service could support no finding other than that it has been loyal, devoted and constituted no present or substantial danger.

Prior to the enactment of the Hatch Act in 1939, political beliefs and affiliations of civil servants were no concern of the Federal Government (*Priddie* v. *Thompson*, 82 F. 186) and, indeed, it was specifically provided that no inquiry should be made "concerning the political or religious opinions or affiliations of any applicant" and "all disclosures thereof shall be discountenanced" (Civil Service Rule I, 5 Code Fed. Regulations (1939) §§ 1-2). Our national experience of 150 years prior to 1939 indicates that according civil servants the political freedom enjoyed by other citizens created no threat to the Government. On the contrary, that freedom encouraged the growth of an efficient and loyal civil service.

Developments after the passage of the Hatch Act did not disclose any changes in that loyalty such as would necessitate the present loyalty program. For the loyalty program grew not out of any threats to our security but out of the rival efforts of the Congress and the President to exploit politically the public anti-communist hysteria. See Emerson and Helfeld, "Loyalty Among Government Employees," 58 *Yale L. J.*, 1, 8-26.

Section 9A of the Hatch Act was supplemented by various other measures. Appropriations, beginning July 1, 1941 (55 Stat. 289 (1941)), were made authorizing the Federal Bureau of Investigation to investigate civil servants. In riders to appropriation bills, Congress forbid payment of salaries to advocates of or members of organizations advocating "the overthrow of the Government of the United States" (see, *e. g.*, 55 Stat. 123 (1941)); and

then forbid payment to specified executive officials (57 Stat. 450 (1943)) until it was held that this device was not available to the Congress (*United States* v. *Lovett*, 328 U. S. 303). The Civil Service Commission investigated civil service applicants and denied employment to an application where there was "a reasonable doubt as to his loyalty" (7 Fed. Reg. 7723 (1942) § 18.2 (c)(7)); while first an Interdepartmental Committee established by the Attorney General (*N. Y. Times*, April 23, 1942, p. 15, col. 3) and then an Interdepartmental Committee on Employee Investigations established by Executive Order 9300, assisted the various agencies in investigating the loyalty of those already in the civil service.

On January 8, 1945 a subcommittee of the House Civil Service Commission was authorized to survey the federal civil service loyalty policies and practices. H. Res. 66, 79th Cong., 1st Sess. (1945). Its report of July 1946 led to the creation, by Executive Order 9806, of the President's Temporary Commission on Employee Loyalty, in November 1946, which was to inquire further into federal employee loyalty standards and machinery, and to report thereon by February 1, 1947. 11 Fed. Reg. 13863 (1946). The Commission's report was submitted to the President on February 20, 1947 but was not then released. *N. Y. Times*, March 23, 1947, p. 1, col. 8. On February 26, 1947, however, the House Committee on Un-American Activities proposed the establishment of a Federal Loyalty Commission with final powers to pass upon employee loyalty. *N. Y. Times*, February 27, 1947, p. 14, col. 2. This announcement to the press proved a potent stimulant in the pre-election year of 1947 and shortly thereafter it became known that President Truman was preparing recommendations to keep "disloyal" persons out of the Government. *N. Y. Times*, March 6, 1947, p. 3, col. 7. On March 22, 1947, the President released simultaneously the report of the Commission and Executive Order 9835 which incorporated most of the Commission's recommendations.

It has been suggested that the Executive Order ". . . was received with outward applause and inward chagrin by the Republicans in Congress, many of whom felt the President had adroitly deprived them of a campaign weapon for 1948." *N. Y. Times,* May 1, 1947, p. 1, col. 7; cf. Schlesinger, "What Is Loyalty?", *N. Y. Times,* November 2, 1947, Magazine Section pp. 7, 49; American Civil Liberties Union, *Our Uncertain Liberties* (1948), p. 23. In this connection it is significant that in 1947, after the Executive Order was promulgated but before an appropriation was made for it, the Rees Bill was introduced. H. R. 3813, 80th Cong., 1st Sess. That bill was substantially identical, except for certain administrative differences, with the Executive Order. Hearings were held on this bill in the month of June before the House Committee on Post Office and Civil Service. On June 19, 1947 the Committee brought the bill on to the floor of Congress, together with a report thereon (H. Report 616, 80th Cong., 1st Sess. (1947)), and after extensive debate (93 Cong. Rec. 7066, 7497, 9118-9156), the bill was passed by the House. The bill was subsequently, however, killed in the Senate Civil Service Committee. *N. Y. Times,* July 24, 1947, p. 9, col. 2.

In addition to indicating the political rather than security considerations which motivated the promulgation of Executive Order 9835, the foregoing brief history provides the basis for evaluating the need for the Order. For in view of this plethora of inquiries into the loyalty of federal employees after 1939 it may be assumed that if any menace or threat of subversion of the Government by those civil servants or the designated organizations existed, evidence thereof would have been elicited. The facts will show that no such threat exists.

The first full-scale investigation reported was that by the Interdepartmental Committee set up in 1942 by Attorney General Biddle to check a list of 4112 alleged "subversives" in the Federal Government (*N. Y. Times,* April

23, 1942, p. 15, col. 2), including 1121 names culled from the civil service by Representative Dies (*N. Y. Times*, November 20, 1941, p. 1, col. 3). After five months of intensive inquiry, the Attorney General sent the report of the Federal Bureau of Investigation to the House of Representatives. H. R. Document 833, 77th Cong., 2d Sess. (1942). A total of two persons on the list submitted by Dies were dismissed (*id.*, at 15-16), and of the other 2991 employees investigated, 34 were dismissed (*id.*, at 16-18). The Interdepartmental Committee concluded "Upon review of experience with the project to date, however, we conclude that it should not be continued as a broad personnel inquiry. Results achieved have been utterly disproportionate to resources expended. Sweeping charges of disloyalty in the Federal service have not been substantiated. The futility and harmful character of a broad personnel inquiry have been too amply demonstrated" (*id.*, at 26). Moreover, it was pointed out by the Attorney General that "It is inevitable that such sweeping investigations should take on an appearance of inquisitorial action alien to our traditions. They create disturbance and unrest, hurt esprit de corps, and produce a feeling of unease and insecurity" (*id., at* 4).

The Report in 1946 of the Subcommittee of the House Civil Service Committee* was based upon hearings, which have not been printed, and attempted only "a brief historical statement of the problem and [to] pose certain questions for further study and investigation" (p. 1) for "the subcommittee did not have sufficient time to give the problem as careful study as ought to have been done" (p. 8).

The Report of the President's Temporary Commission on Employee Loyalty of 1947, based on hearings, exhibits and memoranda,** is the principal evidentiary basis upon

* Report of Investigation with Respect to Employee Loyalty and Employment Policies and Practices in the Government of the United States, 79 Cong., 2d Sess. (July 20, 1946).

** The memoranda referred to as exhibits and other exhibits in this Report were not at the New York Public Library which receives all printed matter distributed by the United States Government.

which Executive Order 9835 is premised. Cf. H. Report 616, 80th Cong. 1st Sess. (1947), p. 2. The Commission addressed letters to the Federal Bureau of Investigation, Naval Intelligence and Military Intelligence to ascertain "the extent to which the subversive or disloyal employee constitutes a problem in, or threat to, the federal service" (*id.*, at 10-11). Aside from the general conclusions drawn from the replies received from these agencies (*id.*, at 12), the facts recorded in the Report may be summarized as follows:

(1) From 1942 to 1946 there were reported to the Federal Bureau of Investigation 6193 cases of civil servants for investigation under the Hatch Act and the appropriation acts. Of this number 101 persons were dismissed as a result of the information developed (*id.*, at 16) (see also Hearings before House Committee on Un-American Activities on H. R. 1864 and H. R. 2122, 80th Cong., 1st Sess., Pt. 2 (1947), p. 41).

(2) From 1941 through December 31, 1946 the Civil Service Commission, which had jurisdiction over applicants and employees appointed conditionally, investigated 392,889 persons. Placements in the Federal Government for that same period totalled 9,604,935 (*id.*, at 18) indicating that only a very small percentage of applicants required any investigation. Of those investigated, 1307 were disqualified for the period from 1941 through 1946 on the grounds of "disloyalty" (*id.*, at 17). This figure is partially explained by the fact that "a major contributing factor to the high percentage of ineligibles for the years 1941, 1942 and 1943 was the vigorous standards imposed, *e. g.*, exclusion of foreign born persons from civilian employment at Pearl Harbor" (*id.*, at 19). Of the total number of ineligibles, 694 were considered by the Civil Service Commission to be ineligible as "Communists or fellow travellers" (*id.*, at 17).

(3) The Interdepartmental Committee, set up in 1943 by Executive Order 9300, had referred to it 729 cases

from February 5, 1944 to December 2, 1946 and of those cases 24 employees were dismissed (*id.*, at 20).

The subsequent hearings before the House Committee on Post Office and Civil Service from June 3 to June 10, 1947, revealed no new information, and nothing further appeared in House Report 616 on H. R. 3813, by the House Committee on Post Office and Civil Service, or in the debates on the Rees Bill.

Coincidently with the request by the President for a substantial appropriation in connection with the enforcement of Executive Order 9835, the Civil Service Commission, at a hearing before the House Civil Service Committee, in June 1947, volunteered to supply the Committee with information from the various departments and agencies as to the number of employees discharged on loyalty grounds from July 1, 1946 to March 31, 1947. Hearings on H. R. 3588, 80th Cong., 1st Sess. (1947), p. 55. Consequently, just before the Congress considered the proposed appropriation for the enforcement of Executive Order 9835, newspaper accounts were carried of a report by the Civil Service Commission to the effect that 811 civil service employees had been discharged by various of the agencies for loyalty reasons from July 1, 1946 to March 31, 1947. *N. Y. Times,* July 18, 1947, p. 1, col. 2. Analysis of those accounts reveals that 38 of the 44 agencies reporting to the Commission reported that no employee was fired and no applicant was rejected for alleged disloyalty. Moreover, the figure of 811 was tentative only. While the Navy Department reported the dismissal of 23 civilian employees and the War Department reported the dismissal of 190 civilian employees and the rejection of 10 applicants, the total figure was arrived at by estimating that the War Department had actually disqualified about four times as many as reported. *N. Y. Times,* July 18, 1947, p. 18, col. 3. Subsequent reports from the remaining 10 executive agencies increased that estimate to 831; eight of the ten agencies

reported no dismissals for disloyalty, but the State Department stated that it had removed 20 employees, "mainly for communism," from June 1946 to August, 1947.* *N. Y. Times*, August 15, 1947, p. 8, col. 5.

The Federal Bureau of Investigation has reported, with regard to its investigation under the Executive Order, that by September, 1948, 2,110,521 federal employees had been processed and cleared by the Federal Bureau of Investigation; of the 6344 held for further investigation 5421 had been investigated leading to 1092 agency loyalty hearings wherein 821 employees were found fully loyal, 212 resigned, and only 59 were dismissed; of these 59, two were cleared by the Loyalty Review Board. *N. Y. Times*, September 23, 1948, p. 1.** President Truman stated that the Federal Bureau of Investigation reports show "the loyalty of 99.7% of all federal workers to be not even questionable." (*N. Y. Times*, October 12, 1948, p. 30); and Tom C. Clark, while Attorney General, announced of the investigation of federal employees that "less than one-fourth of 1 percent even had to be questioned as to their loyalty." (*N. Y. Times*, October 20, 1948, p. 10).***

---

* By August, 1947, 8 of these 20 employees had been permitted to resign without prejudice to other Government employment. Thereafter, 10 more were thus permitted to resign. *N. Y. Times*, October 4, 1947, p. 7, col. 5; November 14, 1947, p. 17, col. 4; November 18, 1947, p. 1, col. 6. See also, Andrews, *Washington Witch-Hunt*, pp. 3-103.

** Harry B. Mitchell, President of the United States Civil Service Commission recently submitted an affidavit in the pending suit of *Washington, et al.* v. *Clark, et al.* (Court of Appeals, District of Columbia, No. 10413), wherein he stated:

> "As of March 31, 1949, of the cases reported to loyalty boards, 3,990 had been adjudicated. Of this number, 3,753 have been determined as eligible and only 237 have been determined to be ineligible. Of this 237, only 76 employees have been dismissed; 44 have been restored after appeal; and 117 were in process of appeal or pending removal" (J. A. 47, 48).

According to a more recent report, the number of persons removed under the Order comes to 123. *N. Y. Herald-Tribune*, Nov. 28, 1949, p. 26, col. 1.

*** More recently this figure has been revised to 99.97%. *N. Y. Herald-Tribune*, Nov. 28, 1949, p. 26, col. 3.

From the foregoing certain conclusions may be drawn:

(1) The total number of government workers or applicants dismissed for loyalty reasons, even under the loose, vague standards employed, is relatively small.

(2) Most of the dismissals and rejections occurred in the "sensitive agencies", *i. e.*, the War, Navy and State Departments. The experience of those agencies provides no sound basis for action in other governmental agencies.

(3) After many years of diligent and zealous investigation, the various Executive, Congressional and loyalty program reports, hearings and debates contain few, if any, demonstrated instances of the commission or attempt of any overt act by a federal civil servant which act could be construed as intentionally dangerous or threatening to the welfare of the United States Government. There does not appear to be a single instance where an American civil servant was convicted and punished for treason, sedition,* correspondence with a foreign government, sabotage, or under any of the other laws which protect our national security.** As the Secretary of Commerce, Charles Sawyer, reported recently:

> "* * * up to this time there has not been so much as an inference that, even during the war or later, any federal employee furnished any information to our enemies, nor what any fair-minded person would regard as proof that anything of importance was given illegally to our ally, Russia." *N. Y. Post*, September 5, 1948, p. 27.

---

* See Note, 48 *Columbia Law Rev.* 253, 261 n. 77.

** Lt. N. G. Redin, charged with turning over secret documents to a foreign power, was acquitted. *N. Y. Times*, July 18, 1946, p. 1, col. 6. Six State Department employees were charged with mishandling certain documents: three were never indicted; two were fined; one was nolle prossed; and none were found to have acted with criminal intent. *N. Y. Times*, October 25, 1946, p. 10, col. 4. The conviction of Judith Coplon for espionage is presently on appeal; and it has been announced that the conviction of Alger Hiss will be appealed.

In short, each determination of "disloyalty" made was based exclusively upon membership, affiliation, or "sympathetic association" with organizations proscribed by the agency passing judgment. See *N. Y. Herald-Tribune*, Nov. 28, 1949, p. 26, col. 1-3. But since guilt by association is insufficient as a method of proof (*Herndon* v. *Lowry*, 301 U. S. 242, 260; *Schneiderman* v. *United States*, 320 U. S. 118, 154; *Bridges* v. *Wixon*, 326 U. S. 135, 147; *Kotteakos* v. *United States*, 328 U. S. 750, 772), it is literally correct that "There is no evidence to justify the wholesale screening now undertaken by the Federal Government." American Civil Liberties Union, *Report of Committee on Employees' Loyalty*, January 28, 1948, p. 1. Thus, after the most intensive inquiry into the genesis of the Executive Order heretofore made, it has been concluded:

> "The first question is whether a general loyalty program, embracing all Federal employees, is necessary or desirable. The authors are of the opinion that no sufficient case for such a program has been demonstrated. No concrete showing of immediate and widespread danger adequate to outweigh the price that must be paid in the loss of democratic values, has thus far been presented to the country." Emerson and Helfeld, *op. cit. supra*, p. 135.

The stated justification for the vast loyalty program is not serious or extensive disloyalty in the ranks of the civil service, but the presence of *any* disloyal person in government service (see p. 36, *supra*); and the facts as analyzed reveal that no other justifications could be suggested for exposing 2,000,000 persons to an inquiry into their private thoughts, beliefs and associations and to dismissal for disloyalty based upon hearsay, rumor, gossip and reports from "confidential" sources. This Court is confronted with evaluating whether that justification is constitutionally sufficient. On the one hand, the loyalty program not only authorizes an inquiry into matters of opinion and association but permits a federal employee to be

dismissed as disloyal, and thereby punished (*United States* v. *Lovett*, 328 U. S. 303), for his thoughts and beliefs although it has never heretofore been supposed that mere opinions and beliefs—under any circumstances—could be the basis for punishment. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *United States* v. *Ballard*, 322 U. S. 78, 86; *Mutual Film Corp.* v. *Industrial Comm.*, 236 U. S. 230, 243; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642; Mill, *On Liberty* (1864), pp. 23, 27, 28; cf. *Thomas* v. *Collins*, 323 U. S. 516, 531. On the other hand, the loyalty program stems from no danger of extensive or serious disloyalty in the civil service, for, at the most, there has been shown only desultory, isolated instances of persons belonging to proscribed organizations. Any threat that such persons might create is already the subject matter of laws safeguarding against the civil servant who is disloyal. It is unlawful for a federal employee to be a member of "any political party or organization which advocates the overthrow of our constitutional form of government in the United States" (5 U. S. C. § 118j; see also 18 U. S. C. § 2385). And as any other citizen, the civil servant can be prosecuted if he commits, attempts to commit (18 U. S. C. §§ 2385, 2387), or conspires to commit (*id.*) treason (18 U. S. C. § 2381), sedition (18 U. S. C. § 2384), sabotage (18 U. S. C. § 2151 ff.; 50 U. S. C. § 31), correspondence with a foreign power (18 U. S. C. § 953), or the disclosure of secret documents (18 U. S. C. § 1905; 42 U. S. C. § 1810(b); 50 U. S. C. § 31). In addition the various states have enacted measures which regulate and punish treasonous or seditious activity. Groner, State Control of Subversive Activities," 9 *Fed. Bar Journal* 61. Efficient federal and state police investigation and enforcement of these penal statutes would provide adequate protection. The "present federal loyalty program" has, therefore, been correctly characterized "both as unnecessary and unfair." American Civil Liberties Union, *Our Uncertain Liberties* (1948), p. 23. It realizes the possibility in the dictum that

"our whole civil liberties history provides us with a clear warning against the possible misuse of loyalty checks to inhibit freedom of opinion and expression." President's Committee on Civil Rights, *To Secure These Rights* (1947), p. 50. Deleterious to the morale, independence and integrity of our civil service,* productive of a dangerous political secret police system, and deferential to the principle of guilt by association, the over-all loyalty program is unconstitutional as an unreasonable means employed to meet an unreal and insubstantial evil.

But whatever justification may exist for the wholesale investigation of civil service employees, there is no basis in the history of the Executive Order or elsewhere for according to the Attorney General the power here complained of, *i. e.*, the unfettered power to designate organizations as "subversive."

In its report of 1942 to Attorney General Biddle, the Interdepartmental Committee, after investigating several thousand civil service employees, stated its conclusion that

> "In all but a small residium of the cases, the lead provided by the 'active indices' of front organizations has proved to be utterly worthless." H. R. Document 833, 77th Cong., 2d Sess. (1942), pp. 4, 27.

And the Attorney General further reported that ". . . it is now clear that the objective test of membership in a 'front' organization is thoroughly unsatisfactory" (*id.*, at p. 4).

The recommendation by the President's Temporary Loyalty Commission that the Attorney General have the power to designate a list of "subversive" organizations ap-

* "What anxieties of mind, what prolonged periods of worry, what restraint upon their initiative, will result from their knowledge that their private lives are being secretly investigated, no one can say. But neither can anyone assert that this shadow upon their activities, however intangible and subtle, will not act as a constraint upon their freedom and their sense of independence." O'Brian, "Loyalty Tests and Guilt by Association," 61 *Harvard Law Rev.* 592, 608; see also article in *N. Y. Herald-Tribune*, August 22, 1948, pp. 1, 2, indicating the intellectual restraints caused by the loyalty program.

pears for the first time close to the end of the Commission's Report (pp. 32, 38). It does not appear that any of the agencies contacted recommended to the Commission that the Attorney General have such power (Report, at 12-15), and the Report of the Commission nowhere discusses reasons why the Attorney General should be accorded such vast power. Moreover, neither the Report nor the Executive Order recommended or expressly authorized the Attorney General to publicize the list. In fact, the publication of the list by the Attorney General came only after a great deal of vacillation and indecision. Soon after the Executive Order was promulgated requests were made of the Attorney General that the list which he would compile be made public. *N. Y. Times,* March 26, 1947, p. 27, col. 7; April 12, 1947, p. 19, col. 5. At first the Justice Department expressed doubt that the list would ever be made public; "they fear such action would put listed organizations on their guard and lead them to change their names, thus making necessary a whole new inquiry." *N. Y. Times,* April 13, 1947, p. 10, col. 1. On May 10, 1947 the Attorney General publicly stated that he was not decided as to whether the list would be made public. *N. Y. Times,* May 11, 1947, p. 35, col. 3. About three weeks thereafter the Attorney General publicly announced that the list would be published in thirty days in order to "enable investigators to trace suspected disloyal federal employees from membership in organizations branded as subversive." *N. Y. Times,* June 1, 1947, p. 38, col. 3. Almost six months later the list was published. Another six months later a second, supplementary list was published. *N. Y. Times,* May 29, 1948, pp. 1, 8.

The power of the Attorney General under the Executive Order has been criticized on the floor of the Congress (93 Cong. Rec. 8007, 9119, 9121, 9136, 9140, 9144, 9152; see also H. R. 6219, 6220, 95 Cong. Rec. 13540), by students of the Executive Order (*e. g.,* Notes, 96 *U. of*

Penn. Law Rev. 381, 394, 395; 47 *Columbia Law Rev.* 1161, 1171, 1172; Emerson and Helfeld, "Loyalty Among Government Employees," 58 *Yale L. J.* 1; Durr, "Loyalty Order's Challenge to the Constitution," 16 *U. of Chi. L. Rev.* 298; Kaplan and Borden, "Validity of Loyalty Tests for Federal Employees," 36 *Calif. L. Rev.* 596; Donovan and Jones, "Program for a Democratic Counter-Attack to Communist Penetration of Government Service," 58 *Yale L. J.* 1211; O'Brian, "Loyalty Tests and Guilt by Association," 61 *Harv. L. Rev.* 592; Sherman, "Loyalty and the Civil Servant," 20 *Rocky Mountain L. Rev.* 381; Kaplan, "Loyalty Review of Federal Employees," 23 *N. Y. U. L. Q. Rev.* 437; Schrenk, "Constitutional Law—the President's Loyalty Order—Standards, Procedures and Constitutional Aspects," 46 *Mich. L. Rev.* 942; Fraenkel, "Some Current Civil Liberties Problems," 18 *Brooklyn L. Rev.* 12; Merriam, "Some Aspects of Loyalty," 8 *Pub. Adm. Rev.* 81), by educators (*e. g., N. Y. Times,* April 13, 1947, p. 8E, col. 5-7; *N. Y. Times,* November 27, 1947, p. 38, col. 4; Cushman, "The President's Loyalty Purge," 36 *Survey Graphic* 287 (May, 1947); Commager, "Who is Loyal to America?" *Harpers,* 193-199 (April, 1947)), and by eminent members of the Bar (*N. Y. Times,* September 30, 1948, p. 15, col. 1). Still there nowhere appears any statement by any responsible officer of the Government of the necessity or justification for empowering the Attorney General to pass judgment upon the orthodoxy of organizations.

The use of membership, affiliation or sympathetic association with a designated organization as one of the Executive Order standards for determining employee loyalty is inadequate as a foundation for the extraordinary powers the Attorney General exercised under the Executive Order. It has been repeatedly stated by President Truman (*N. Y. Times,* November 15, 1947, p. 2, col. 2) and the defendants Richardson and Clark (*N. Y. Times,* December 23, 1947,

p. 28, col. 2; see also 13 Fed. Reg. 253, 254 (1947)) that the foregoing standard is "only one piece of evidence." If the Attorney General is authorized to declare any organization "subversive" merely to provide "only one piece of evidence," the disproportion between purpose and power, between the necessity for the power and the resultant injury, is so great that the grant of power to the Attorney General must be held invalid as unreasonable.

To the extent that the Attorney General's power under the Executive Order is to give content to a standard which is more than just "one piece of evidence," the power is invalid in that it is dedicated to a purpose which is unconstitutional. The Attorney General's power is basically an implement for a standard which is premised upon the abhorrent principle of guilt by association. That principle has met with uniform judicial repudiation. *Herndon* v. *Lowry*, 301 U. S. 242, 260; *Schneiderman* v. *United States*, 320 U. S. 118, 154; *Bridges* v. *Wixon*, 326 U. S. 135, 147; *Kotteakos* v. *United States*, 328 U. S. 750, 772; *United States* v. *Hauck*, 155 F. 2d 141, 144; President's Committee on Civil Rights, *To Secure These Rights* (1947), p. 50; Chafee, *Free Speech in the United States* (2 ed. 1941), pp. 167, 470, 484. If the grant of power is to effectuate the implementation of that principle, it is constitutionally defective.

Moreover, the application of guilt by association under the loyalty program results in the punishment of civil servants for their private opinions, beliefs, thoughts, and attitudes. Such punishment, unconstitutional in the instance of private citizens, is similarly invalid so far as public employees are concerned. For there is no exception which would warrant the punishment of civil service employees for their thoughts and opinions. See *Ex Parte Garland*, 4 Wall. (U. S.) 333, 378; *United States* v. *Thayer*, 209 U. S. 39, 42. In *United Public Workers* v. *Mitchell*, 330 U. S. 75, this Court not only recognized freedom of

thought and opinion of civil service employees but also expressly reserved to such employees freedom of expression.

> "Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success." (330 U. S., at p. 110.)

The Attorney General's power of designation, which was granted in order to effectuate a standard whereby civil servants may be punished for beliefs only, is premised upon a purpose which is not only insufficient to warrant the unprecedented powers of the Attorney General but also in violation of the basic principles of the First Amendment.

C

Executive Order 9835 Violates the Fifth Amendment in That Organizations Are Designated Thereunder Without Due Process of Law

It is the basic contention of the petitioner that the power resides nowhere, and particularly not in the Attorney General, to declare an organization as "subversive" under the vague and undefinable standards contained in Executive Order 9835. But if that power be deemed to exist, and, further, if that power be deemed to reside in the Attorney General, then it is urged that the absence of essential safeguards surrounding the exercise of that power violates the Due Process Clause of the Fifth Amendment.

This Court has recently defined the minimum guarantees contained in the Due Process Clause:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U. S. 257, 273.

These various guarantees apply to administrative action under the requirement that parties directly affected by such action are entitled to a fair hearing, including the right to notice, to be heard, to hear and test the evidence presented, and to decisions based upon the evidence. *Morgan* v. *United States*, 301 U. S. 292, 304 U. S. 1; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; *Chicago Junction Case*, 264 U. S. 258, 263; *I. C. C.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91, 92, 93; *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292. The right to a fair hearing is deemed particularly essential where, as here, the rights affected are not only property rights but personal and civil liberties guaranteed by the Bill of Rights. *Bridges* v. *Wixon*, 326 U. S. 135; *Ng Fung Ho* v. *White*, 259 U. S. 276; *Wong Wing* v. *United States*, 163 U. S. 228. In *Walker* v. *Popenoe*, 80 App. D. C. 129, 149 F. 2d 511, it was held that the barring of a publication from the mails as obscene without a notice or hearing was a denial of due process. The concurring opinion therein stated:

> "In making the determination whether any publication is obscene the Postmaster General necessarily passes on a question involving the fundamental liberty of a citizen. This is a judicial and not an executive function. It must be exercised according to the ideas of due process implicit in the Fifth Amendment."
>
> "There are no absolute and enduring standards of what is obscene . . . The determination of whether a publication violates such changing standards is certainly one which should not be undertaken without a hearing" (149 F. 2d, at 513, 514).

The constitutional necessity for hearings here is not affected by the circumstance that the Attorney General's action consists of the designation of organizations rather than the adjudication of a dispute. In *Shields* v. *Utah Idaho Central RR Co.*, 305 U. S. 177, it was observed with respect to the hearings which preceded the Interstate Commerce Commission's designation of a railway as a non-interurban electric railway:

> "And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist" (305 U. S., 182).

The constitutional provision that Congress shall enact no bill of attainder prevents the Congress from trying and adjudging a man or an organization as "disloyal"; this prohibition derives from the necessity that such an adjudication can be made only after a full and fair judicial trial. *United States* v. *Lovett*, 328 U. S. 303. It would be anomalous, if in the face of the multiple constitutional procedural safeguards imposed upon judicial or legislative action which results in a stigmatizing official judgment, the executive branch, governed by the Due Process Clause of the Fifth Amendment, could find and brand an organization as "subversive" without affording that organization any one of the processes of defense dictated by the most elementary considerations of fair play or due process. At the very least, petitioner was entitled to the hearings and other safeguards afforded by the United States to German organizations before they were declared to be illegal at the war crimes trial. *Nurnberg Trials*, 6 F. R. D. 68, 111-112, 131-132, 160-167, 180, 182, 187; *N. Y. Times*, May 4, 1947, p. 10E, col. 5. The determination of political orthodoxy is vulnerable to sufficient abuse without removing from that determination the proper restraints imposed by a fair hearing. *In re Oliver*, 333 U. S. 257, 268. ". . .

injustices flourish where procedural requirements are relaxed." DOUGLAS, *J.*, "Procedural Safeguards in the Bill of Rights," 31 *Amer. Jud. Soc. J.* 166, 168.

No special exigencies here exist which require that the JAFRC be denied its constitutional right to a hearing. There is no emergency which makes it impossible to expend the time which may be necessary for a fair hearing. Cf. *Lawton* v. *Steele*, 152 U. S. 133; *Hirabayashi* v. *United States*, 320 U. S. 81. And the need to maintain the secrecy of informants or sources of information, as the basis for depriving the JAFRC of a hearing, is no more persuasive here than in the trial of any charge based upon secret information. *Kwock Jan Fat* v. *White*, 253 U. S. 454, 459; *Colyer* v. *Skeffington*, 265 F. 17; *Chew Hoy Quong* v. *White*, 249 F. 869. Nor should hearings and findings here be dispensed with because of any assertion which may be made that many organizations have covert objectives and methods which make more formal proof of their "subversive" nature too difficult. For if proof cannot be obtained by an efficient police system as to subversive methods or objectives how then can civil service employees be discharged for the barest contact or sympathetic association with organizations which are so successful in secreting their purposes and methods?

The constitutional requirement that organizations are entitled to a full and fair hearing before they may be designated by the Attorney General has, apparently, been recognized even by the House Committee on Un-American Activities. In a recent report by a subcommittee thereof, it was stated in connection with a proposed bill which would require the registration of organizations:

> "The bill provides for administrative hearings in the Department of Justice in those cases where Communist Party front organizations refused to register voluntarily. During this hearing the organization will be given an opportunity to present witnesses in

> its own behalf, as well as being provided with other safeguards. Full judicial review of the findings of the Attorney General is provided. The subcommittee believes that this provision constitutes a landmark in that it provides for the establishment of proper legal procedures which will eventually replace the ex parte findings under the present loyalty order." Report of the Subcommittee on Legislation of the Committee on Un-American Activities (1948), p. 5.

It is submitted that "*ex parte* findings" and the absence of "proper legal procedures . . . under the present loyalty order" constitute the Executive Order a violation of the Due Process Clause of the Fifth Amendment.

D

The Issues Here Presented Are Justiciable

The uncontroverted complaint and affidavits submitted by petitioner allege that as a result of certain wrongful acts of the respondents, substantial property and constitutional rights of the JAFRC and its members have been and will continue to be impaired; that those acts were purportedly done pursuant to Executive Order 9835; that the Order is unconstitutional; and that the relief sought will mitigate the wrongful injuries already inflicted and will prevent the threatened injuries from eventuating.

The Court below ruled, however, that the foregoing record presented no justiciable controversy in that the action of the respondents imposed "no obligation or restraint" upon the petitioner but was merely the furnishing "of information and advice" which injured the JAFRC only "incidentally" or "indirectly."

It is a basic principle of equity jurisdiction that unauthorized action by a public official causing injury to a legally protected right gives rise to a justiciable issue ir-

respective of whether that action consists of some express compulsion or deprivation. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Waite* v. *Macy*, 246 U. S. 606; *Red Canyon Sheep Co.* v. *Ickes*, 69 App. D. C. 27, 98 F. 2d 308. Action by a public official based on no valid authority and causing injury to a legally protected right is within equitable cognizance. *Philadelphia Company* v. *Stimson*, 233 U. S. 605; *Ex Parte Young*, 209 U. S. 123; *Hays* v. *Seattle*, 251 U. S. 233; *Bell* v. *Hood*, 327 U. S. 678, 684; see *Tennessee Electric Power Company* v. *Tennessee Valley Authority*, 306 U. S. 118, 137. It is immaterial that the injury to the JAFRC was occasioned by publicity and respondents' conduct did not assume the more formal, orthodox and traditional forms of governmental action. The development of new techniques of governmental action should not put a party out of court. The peculiar genius of equity jurisdiction is its flexibility and its adaptability, for the safeguarding of individual rights, to new modes of governmental action. It is imperative that equity principles be applied to the publicity technique which has been increasingly employed by government as a sanction or regulatory device. For ostracism is a damaging penalty and a potent deterrent. The Constitution itself is replete with safeguards with respect to official judgments which would cause the party judged to be socially or politically ostracized. *United States Constitution*, Article I, §§ 3 (cl. 6, 7), 9 (cl. 3), 10 (cl. 1); Article III, §§ 2 (cl. 3), 3; Amendment V; Amendment XIV, § 3. The status of publicity as an instrument of governmental action, generically identical with imprisonment, fines, licensing powers and other sanctions, has come to be recognized. See, *e. g.*, Landis, *The Administrative Process* (1938), pp. 90, 108-110; President's Committee on Civil Rights, *To Secure These Rights* (1947), p. 52; Commissioner of Investigation of the City of New York, *Annual Report* (1938), p. 13; Davis, "The Administrative Power of Investigation," 56 *Yale Law Journal* 1111, 1136; Note, "Constitu-

tional Limitations on the Un-American Activities Committee," 47 *Columbia Law Rev.* 416, 418. VINSON, *C. J.*, in *Glass* v. *Ickes*, 72 App. D. C. 3, 117 F. 2d 273, cert. den., 311 U. S. 718, quoted *United States* v. *Birdsall*, 233 U. S. 223, 231, and declared that "Public announcements may well, on occasion, be 'an action which may properly constitute an aid in the enforcement of the law'" (117 F. 2d. 277, n. 9). And in *Barsky, et al.* v. *United States*, 167 F. 2d 241, publicity and "exposure" occasioned by a Congressional committee were treated as a type of governmental action capable of impairing rights guaranteed under the First Amendment.

If the designation of the JAFRC as "subversive" had been uttered by a private individual it would plainly have been justiciable and, indeed, actionable *per se*. *Grant* v. *Readers Digest Association*, 151 F. 2d 733, cert. den. 326 U. S. 797; *Mencher* v. *Chesley*, 297 N. Y. 94; *Kaminsky* v. *American Newspapers, Inc.*, 283 N. Y. 748; *Spanel* v. *Pegler*, 160 F. 2d 619; *Wright* v. *Farm Journal*, 158 F. 2d 976. The circumstance that the utterance was by a public official does not make the wrong committed and the injury resulting therefrom any less justiciable; questions of privilege (see pp. 74-76, *infra*) or reviewability (see pp. 68-73, *infra*) may arise from that circumstance, but in no action brought against an official for a stigmatizing utterance has the justiciability of the controversy been doubted. See, *e. g.*, *Spalding* v. *Vilas*, 161 U. S. 483; see also 48 *Columbia Law Rev.* 1050, 1057. In fact, as the defamatory characterization of petitioner is a label attached and disseminated by an official agency of government, the prestige and the power behind the agency cause that label to have a more damaging effect than is inherent in the label itself. It was pointed out by LEARNED HAND, *J.*, that where "the hearer is in his power" the language of the speaker may "have a force independent of persuasion." *National Labor Relations Board* v. *Fiederbush Co.*, 129 F. 2d 954, 957; see also Note, 43 *Columbia Law Rev.* 837, 942-943.

This Court has plainly indicated its awareness that the dissemination of a stigmatizing official judgment by an agency of government is to be subject to the limits imposed upon other forms of government action. In *Keegan* v. *United States*, 325 U. S. 478, the Court had before it a section of the Selective Service Act which provided that it was "the express policy of the Congress" that vacancies caused in private employment by induction "shall not be filled by any person who is a member of the Communist Party or the German American Bund" (50 U. S. C. App. § 308(i)). No further compulsion or sanction was contained in that section. The Government conceded that the aforesaid provision was unconstitutional, but maintained its unconstitutionality could be ignored on the grounds that the aforesaid provision was a mere "admonition." Mr. Justice BLACK, in a concurring opinion, disposed of this contention very briefly.

> "It has been urged that these defendants had no legitimate reason to protest against these provisions because they were obviously unconstitutional and amounted to no more than an admonition; *but they were an admonition sounded by the highest legislative body of the nation*" (325 U. S., 496). (Italics added.)

And thereafter Mr. Justice BLACK indicated that the aforesaid provision violated the Bill of Attainder prohibition of the Constitution.

In *United States* v. *Lovett*, 328 U. S. 303, the Congress provided:

> "in § 304 of the Urgent Deficiency Appropriation Act of 1943, by way of an amendment attached to the House Bill, that after November 15, 1943, no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 14, 1943 again appointed to jobs by the President

with the advice and consent of the Senate" (328 U. S., 305).

The Congressional Counsel urged that no justiciable constitutional issue was presented in an action by respondents to recover salaries earned but not paid. The argument was rejected and the statute involved was thereafter held to be unconstitutional.

> *"Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result"* (328 U. S., 316). (Italics added.)

Respondents' action was not only justiciable as the publication of a "blacklist" calculated to frustrate legitimate First Amendment activities of designated organizations,* it is also justiciable because it had the effect of fixing the status of the JAFRC as a "subversive" organization for the purpose of future administrative action. The Order provides that the list of designated organizations is to be disseminated to agencies established to pass upon employee loyalty (Part III, § 3), and those agencies are instructed to utilize that list (Part V, § 2(f)). The Loyalty Review Board has ruled that local Loyalty Boards in the administration of Executive Order 9835 are not to "enter upon any evidential investigation . . . for the purpose of attacking, contradicting or modifying the controlling conclusion reached by the Attorney General" as to the designation of an organization. Memorandum No. 2 of the Civil Service Commission Loyalty Review Board, March 9, 1948; see also Memorandum No. 12, June 23, 1948. In this manner

* Prior to the publication of the list, the Attorney General was requested to make public his list of "subversive" organizations to protect the public in order that "they could refrain from joining or contributing funds to them." *N. Y. Times*, March 26, 1947, p. 27. The complaint alleges and it is undenied that the designation of petitioner by the Attorney General has caused contributors, patrons, members and volunteer workers to rupture their connection with the JAFRC (R. 7).

the status of the JAFRC is finally and irrevocably fixed by the Attorney General's list as a "subversive" organization in the administration of the "loyalty program."*

Such fixation of status, for the purpose of future administrative regulation, creates a justiciable controversy although it does not direct any present or future action or inaction on the part of the complaining party.** Cf. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125. The test is whether the determination results in injury to the complaining party.

In *Shields* v. *Utah Idaho Central Railway Co.*, 305 U. S. 177, it was held that the determination by the Interstate Commerce Commission that a certain railway was not an interurban electric railway was the basis for review in a court of equity. Although the designation of the railway by the Commission was not reviewable as an order (*Shannahan* v. *United States*, 303 U. S. 596), and although the designation was not made "for the purpose . . . of further proceeding by the Commission itself" (305 U. S., 183), the action was nevertheless entertained for the reason that the designation was "part of a regulatory scheme" under the Railway Labor Act (*id.*)*** and for the further reason

* The list also had the effect of fixing the status of the JAFRC for other purposes. In one instance the JAFRC found that the Bureau of Internal Revenue declared the organization to be non-tax-exempt (*N. Y. Times*, February 3, 1948, p. 21 (R. 26); see also *N. Y. Times*, October 22, 1948, p. 17, col. 1, for additional listed organizations which lost tax-exemptions). Upon another occasion it was administratively determined that in view of the petitioner's inclusion on the list submitted to the Loyalty Review Board by the office of the Attorney General prepared under Part III, Section 3 of the President's Executive Order 9835, the organization could not be deemed a proper one by the Pennsylvania Department of Welfare for registration for a certificate to solicit funds (R. 28).

** Under the Administrative Procedure Act of 1946, any person injured by "agency action" may seek judicial review thereof (Section 10(a)). "Agency action" includes any agency rule (Section 2(c)) which has been defined as "*any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy*" (Section 2(c)) (italics added). It is plain that the listing of the JAFRC is judicially reviewable and therefore justiciable under the Administrative Procedure Act.

*** Compare this aspect of the *Shields* case with the utilization of the Attorney General's designation by the agency loyalty boards and the Loyalty Review Board.

that the applicability of other legislation to the railway was premised upon "the same criterion" of whether it was an interurban railway (305 U. S., 184).*

> "In these circumstances we think respondent was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status" (305 U. S., 184).

In the recent case of *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18, this Court held that the designation of a union as a "bargaining agent" could give rise to a justiciable controversy although that certification did not order any action or inaction by the complaining employer and although that certification might be reviewed and set aside in a subsequent administrative or judicial proceeding:

> "The fact that Wisconsin's certification was not in the form of a command is immaterial. See *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 408. It was not an abstract determination of status. Nor was it merely an interim adjudication in an uncompleted administrative process. It established legal rights and relationships. It told the employer, subject to judicial review, with whom he could not refuse to negotiate without risk of sanctions. The character of the certification was therefore such as to make it reviewable under the appropriate standards for exercise of the federal judicial power" (336 U. S., 23-24).

The decisive applicability of *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, to the case at bar has been recently noted as follows:

> "In that case the Federal Communications Commission had issued an announcement of general policy

* Compare this aspect of the *Shields* case with the utilization of the Attorney General's designation by other agencies such as the Bureau of Internal Revenue and state licensing agencies.

which was to govern the renewal of station licenses. Stations renewing long-term 'bloc-time' contracts with radio networks would not obtain license renewals from the Commission. As a result, many stations refused to renew their contracts with the plaintiff network, and it sought an injunction restraining the Commission from adhering to its proposed standard. The Supreme Court recognized that despite the generality of the policy announcement, and even though it did not directly deny or cancel licenses, its necessary effect, as a result of the combination of present announcement and the existence of potential regulatory power, was to regulate. The announcement was therefore deemed to be present regulation.

"The analogy between the action taken by the Attorney General and that taken by the Federal Communications Commission in the *Columbia Broadcasting System* is clear. In both cases there is a present announcement of criteria for the future exercise of regulatory power. In neither case is there any certainty that the regulatory power will in fact be exerted, but in both cases the plaintiff has suffered present damages. Since the Attorney General's action thus constitutes regulation, it falls within one of those categories of action which are capable of invading legal rights. . . ." Note, 48 *Columbia Law Review*, 1050, 1053-1054; see also Emerson and Helfeld, "Loyalty among Government Employees," 58 *Yale Law Journal* 1, 119, 120.

As the designation of the JAFRC by the Attorney General is final and binding, particularly so far as the administration of the loyalty program is concerned, the listing of the JAFRC is more than a statement which is merely defamatory or deprecatory in nature. It is an adjudication on the basis of which sanctions of the gravest type can be and are imposed. It fixes the status of the JAFRC finally for loyalty purposes and it informs every civil servant that membership in, affiliation with, or sympathetic association with the organization exposes that civil servant to

dismissal for disloyalty. Indeed, the principal purpose for the publication of the "list" was to put civil service employees and applicants on notice that "association" with the JAFRC will result in ineligibility. See H. R. Report 616, 80th Cong., 1st Sess. (1947), p. 4. Under pain of loss of job and the stigma of disloyalty, no present or prospective civil servant can venture to maintain the barest connection with the JAFRC. The action of the Attorney General is therefore no administrative report or investigatory finding—it is a determination enforceable by governmental action and sanctions. According to *Columbia Broadcasting System* v. *United States*, the justiciability of such a determination is beyond dispute, even though that determination does not directly command action or inaction by the complaining party.* As the administrative rule in the *Columbia Broadcasting System* case caused the parties directly governed by the rule to sever their relationships with the complaining party under threat of future governmental sanctions or action, so the designation of the JAFRC by the Attorney General has caused present or prospective civil servants to sever their connection with the JAFRC under the threat of future dismissal by the Government; in short, as the FCC rule created a justiciable issue in the *Columbia Broadcasting* case, so the action of respondents has resulted in a justiciable issue.

The Court below failed to discuss or distinguish the *Columbia Broadcasting System* case but instead relied upon *Standard Sc'e Co.* v. *Farrell*, 249 U. S. 571, where

* It has been repeatedly held, in contrast with the ruling below, that a statute or an administrative ruling may be challenged by an individual who has not thereby been commanded to perform or refrain from any acts where that statute or ruling adversely affects the interests of the complaining party because it directs or induces others to action injurious to the complaining party. *Stark* v. *Wickard*, 321 U. S. 288, 303; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *Pierce* v. *Society of Sisters of Holy Names*, 268 U. S. 510; *Buchanan* v. *Warley*, 245 U. S. 60; *Truax* v. *Raich*, 239 U. S. 33; *Martin* v. *Struthers*, 319 U. S. 141, 146. And the standing of the complaining party is not affected by the fact that the relationship thus impaired is one terminable at will (see, *e. g.*, *Truax* v. *Raich*, *supra*; *Pierce* v. *Society of Sisters of Holy names*, *supra*); it is sufficient that the impairment of the relationship results in loss to the complaining party.

it was held that publication and distribution of a bulletin by the New York Superintendent of Weights and Measures was not state action subject to the limitations of the Fourteenth Amendment.*

The *Farrell* case does not govern here. In the *Farrell* case the complainant, a scale manufacturer, challenged a finding by the State Superintendent that certain types of scales were defective. The distinctions between this situation and the case at bar are manifold: (1) the finding in the *Farrell* case was *"generic"* (249 U. S., 547) and did not specifically refer to the complainant's scales as the Attorney General referred to the JAFRC by name; (2) the superintendent's action did not affect any of the preferred constitutional rights such as freedom of expression or association; and (3) the superintendent's findings were not a binding determination, as the list of the Attorney General is conclusive upon loyalty program and other administrative agencies, for the purpose of subsequent governmental action. Moreover, as was stated by Mr. Justice BRANDEIS at the outset of the *Farrell* decision:

> "No question is made as to the constitutionality of the statute creating the office of state superintendent and defining his duties" (279 U. S., 573).

Only the particular action complained of was put in issue. While the issuance of a publication (*Standard Scale Co.* v. *Farrell*, 249 U. S. 571), the recommendations of a labor board (*Pennsylvania R. Company* v. *Labor Board*, 261 U. S. 72; *Employers Group* v. *N.W.L.B.*, 143 F. 2d 145, cert. den., 323 U. S. 735; *N.W.L.B.* v. *United States Gypsum Co.*, 145 F. 2d 97, cert. den., 324 U. S. 856), and assessments (*United States* v. *Los Angeles & S. L. R. Co.*, 273

* The *Farrell* case has frequently been cited for the proposition that state action is reviewable regardless of the form it assumes. See, *e. g.*, *King Manufacturing Co.* v. *Augusta*, 277 U. S. 100, 104, 126; *Starr & Co.* v. *Commissioner of Internal Revenue*, 101 F. 2d 611, 614; *United States* v. *Estep*, 150 F. 2d 768, 777.

U. S. 299) were held not to be governmental action giving rise to a justiciable issue, a challenge to the validity of the authority pursuant to which such publication, recommendation or assessment was made would give rise to a justiciable issue. Thus, in *Ex Parte Williams*, 277 U. S. 267, Mr. Justice BRANDEIS expressly indicated that while an assessment does not create a justiciable issue, if a "question as to the validity of the taxing statute which authorized that assessment" had arisen, a justiciable question would have been presented (277 U. S., 271). Consequently, although petitioner's standing here is predicated upon the inclusion of the JAFRC in the Attorney General's list, it is decisive that the petitioner challenges the constitutionality of the Executive Order which authorizes the issuance of the list. And since that Executive Order is plainly governmental action, irrespective of the characterization which may be assigned to the list itself, neither the *Farrell* case nor any other authority renders non-justiciable a dispute as to the constitutionality of the Order.

United States v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, cited and relied upon below, was an action to enjoin and annul an ICC order determining the valuation of the property of the petitioner. The petitioner claimed that the valuation was unconstitutional and had caused the petitioner irreparable injury. The Court held that the order of valuation was not reviewable. In the course of his opinion, Mr. Justice BRANDEIS pointed to several characteristics of the assessment which distinguished it from the action here complained of.

In the first place, the investigation "was not a step in a pending proceeding" and "was merely preparation for possible action in some proceeding which may be instituted in the future" (273 U. S., 310), as compared with the binding designation of organizations by the Attorney General, the use of which is not merely optional and dependent upon some "possible" "future" "proceeding"

but which necessarily and in fact has been employed in the loyalty proceedings conducted under Executive Order 9835.

Moreover, the valuation was to constitute *prima facie* evidence only of the value in subsequent proceedings and established only a rebuttable presumption (273 U. S., 311, 312), as compared with the determination of the Attorney General which is final, binding and irrevocable in the subsequent proceedings wherein that determination is employed.

Again, while "Congress . . . provided adequate remedies for the correction of errors in the final valuation and classification thereof" (273 U. S., 312-313), there is absolutely no procedure within the administration of the loyalty program whereby a designated organization may be heard in advance of its designation or whereby it may subsequently accomplish any changes or revision in the designation.

The various early War Labor Board cases cited similarly fail to sustain the ruling below.

Pennsylvania R. Company v. *United States R. Labor Board,* 261 U. S. 72, never reached the question whether a Railway Labor Board order was justiciable. On the contrary, to the extent that the case considered and decided whether the Labor Board acted within its statutory jurisdiction, this Court apparently assumed that an order enforceable only by moral suasion could create a justiciable issue.

Pennsylvania R. System v. *Pennsylvania R. Company,* 267 U. S. 203, was an action to enjoin the violation of a Railway Labor Board order and the issue there was not one of justiciability, but whether the order created an enforceable right or duty. And while the Court there held that no such enforceable right or duty was created by a Labor Board order, there is much language in the opinion

which suggests that governmental action which invokes the sanction of public opinion may be considered as similar to any other type of governmental action (see 267 U. S., 216).

None of the more recent War Labor Board cases cited (*Employers' Group, etc.* v. *NWLB*, 143 F. 2d 145, cert. den. 323 U. S. 735; *NWLB* v. *United States Gypsum Co.*, 145 F. 2d 97, cert. den. 324 U. S 856) is here applicable, for each of those cases was decided on the grounds that the Congress had specifically intended that War Labor Board orders not be reviewable See, particularly, *Employers' Group, etc.* v. *NWLB, supra.* As the author of the leading War Labor Board case, *Employers' Group, etc.*, v. *NWLB, supra,* pointed out in his dissent herein, the administrative rulings in those cases "were not enforceable against anybody, were not defamatory, and caused no loss" (R. 48) as distinct from the final and binding determination and pronouncement by the Attorney General that the JAFRC is a "subversive" organization. Moreover, since each of those cases involved the correctness of War Labor Board decisions rather than the constitutionality of the authority under which the War Labor Board acted, none of the cases is determinative of the case at bar.

This Court in the *Columbia Broadcasting System* case established that an administrative rule promulgated to govern future decisions by that administrative agency gives rise to a justiciable controversy at the instance of a party not governed by that rule but injured as a consequence of private action by those parties who are subject to the rule. The decision thus reached by this Court in the *Columbia Broadcasting System* case is here plainly applicable—indeed, since the action of the Attorney General in the instant case possessed the additional feature of a defamatory characterization, the controversy here involved is even more clearly justiciable than that in the *Columbia Broadcasting System* case. The Court below, in its opinion, failed to discuss or otherwise distinguish the *Columbia*

Broadcasting System case, but instead, relied upon other inapplicable decisions of this Court to arrive at a conclusion inconsistent and in conflict with the decision in *Columbia Broadcasting System, supra.*

E

Executive Order 9835 and the Actions of Respondents Thereunder Are Reviewable

The rights of the JAFRC here impaired are not only recognized property rights, but also include constitutional rights of freedom of thought, expression and association;* and the wrong committed was not merely an error in "the exercise of official discretion," but the assertion of a power which exceeds the constitutional power of the Executive.** Such circumstances have traditionally been deemed sufficient to invoke equity jurisdiction. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 619; *Ickes* v. *Fox,* 300 U. S. 82, 96, 97; *Ex Parte Young,* 209 U. S. 123. But the Court below held that the Attorney General here acted as the *alter ego* of the President and that the action of the Attorney General was as non-reviewable as the action of the President would have been if he had acted himself (R. 38).

This is not an action against the President of the United States. He is not named as a party nor is he an indispensable party to the action. The circumstance that he promulgated Executive Order 9835 no more renders this a suit against the President than the circumstance that the Congress enacts a law renders a suit challenging the

* *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, cited below, did not involve the impairment of a legally protected property or constitutional right and is, therefore, inapposite here; and *Friedman* v. *Schwellenbach*, 81 App. D. C. 365, 159 F. 2d 22, cert. den., 330 U. S. 838, is likewise of no force here since the plaintiff's status was merely that of a temporary, conditional civil servant.

** *Decatur* v. *Paulding*, 14 Pet. (U. S.) 497, is a typical instance wherein an alleged error in a matter resting in the administrator's discretion was held non-reviewable.

validity of that law a suit against the Congress. Indeed, as Executive Order 9835 has distinctively legislative features,* the analogy suggested is particularly appropriate. Cf. *Ex Parte Endo*, 323 U. S. 283, 298-300.

It has never heretofore been held that the action of a cabinet officer is non-reviewable as the action of the President. In fact, instances abound in which equity jurisdiction has been exercised over such cabinet officers. See, *e.g.*, *Philadelphia Co.* v. *Stimson, supra; Ickes* v. *Fox, supra; Waite* v. *Macy*, 246 U. S. 606. That jurisdiction does not dissipate because the wrong or constitutional excess committed by the executive officer is the exercise of executive power derived from the Constitution as compared with power delegated by the Congress. The doctrine of the supremacy of law had its inception, in Anglo-American law, in the subjection of the Executive to judicially defined legal limits. 2 Holdsworth, *History of English Law* (3 ed. 1923), p. 255; Pound, *Spirit of the Common Law*, pp. 60, 67, 69; *Case of the Monopolies*, 11 Coke, 846 (K. B. 1603); *Prohibitions del Roy*, 12 Coke, 63 (1610). In *Hurtado* v. *California*, 110 U. S. 516, 531-532, this Court declared:

> "In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial."

Similarly, one authority has observed:

> "Within the sphere of his authority under the Constitution, the Executive is independent, and judicial process cannot reach him. But when he exceeds his authority, or usurps that which belongs to

* The Rees Bill (H. R. 3818, 80th Cong., 1st Sess. (1947)) was identical with Executive Order 9835 except in respects not here material.

one of the other departments, his orders, commands, or warrants protect no one, and his agents become personally responsible for their acts. The check of the courts, therefore, consists in their ability to keep the Executive within the sphere of his authority by refusing to give sanction of law to whatever he may do beyond it, and by holding the agents and instruments of his unlawful action to strict accountability." Cooley, *Constitutional Law* (4 ed. 1931), p. 203.

This Court has very recently indicated the test applicable to the determination of the validity of the exercise of executive power which is derived from the Constitution.

"We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. Those analogies are suggestive here. We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Ex Parte Endo*, 323 U. S. 283, 299-300.

And, accordingly, it appears that the constitutionality of executive agreements, as of treaties, is a proper subject of judicial review. *United States* v. *Pink*, 315 U. S. 203;

Littauer *"The Unfreezing of Foreign Funds"* 45 *Columbia Law Rev.* 132, 160-169; Note, 48 *Columbia Law Rev.* 890; 897. Even with respect to the Executive's vast war powers, it is "well established" that "what are the allowable limits . . . are judicial questions." *Sterling* v. *Constantin,* 287 U. S. 378, 401; see also *Duncan* v. *Kahanamoku,* 327 U. S. 304; *Ex Parte Quirin,* 319 U. S. 1; *Scherzberg* v. *Maderia,* 57 F. Supp. 42; *Ebel* v. *Drum,* 52 F. Supp. 189.

It is, therefore, not surprising that, upon occasion, the action of executive officers exercising power purportedly derived from Article II of the Constitution (rather than power delegated by the Congress) has been held by this Court to be invalid. Thus in the great ruling in *Ex Parte Milligan,* 4 Wall. (U. S.) 2, the action there held violative of the Constitution was that of an executive officer acting pursuant to a mandate of the President as Commander-in-Chief. And in *Humphrey's Executor* v. *United States,* 295 U. S. 602, this Court deemed invalid action by the President which was said to be an exercise of the inherent removal power of the Executive—the inherent executive power here asserted to respondents.

To the extent that Executive Order 9835 is, as stated in the preamble thereto, based upon the Civil Service and Hatch Acts and is the exercise of power delegated by the Congress to the President, it is evident that the exercise of that delegated power is the subject matter of judicial review. For if a Congressional enactment governing the activities of employees of the Federal Government may be directly reviewed upon a challenge to its constitutionality (see, *e.g. United Public Workers* v. *Mitchell,* 330 U. S. 75; *United States* v. *Lovett,* 328 U. S. 303), it of course follows that the delegation of power by the Congress to the Executive with respect to the federal civil service may also be the subject matter of judicial review (*Panama Refining Company* v. *Ryan,* 293 U. S. 388, 433).

To the extent that Executive Order 9835 is predicated upon some alleged executive constitutional power, the question of its constitutionality as presented in the instant case is a non-political and reviewable question. Here private property or other constitutional rights have been impaired to the detriment of the complaining party. Thus, while a political question may exist where "no case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill" (*Georgia* v. *Stanton*, 6 Wall. (U. S.) 50, 77), or where a state institutes an action as *parens patriae* on behalf of its citizens (*Massachusetts* v. *Mellon*, 262 U. S. 447), or where "the basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity" (*Colegrove* v. *Green*, 328 U. S. 549, 552), or where a group of senators institute an action complaining of the method of adopting an amendment to the United States Constitution (*Coleman* v. *Miller*, 307 U. S. 433), or where a Governor of one state seeks to compel the Governor of another state to extradite a fugitive from justice (*Kentucky* v. *Dennison*, 24 How. (U. S.) 66), a justiciable, reviewable, non-political question exists here where the complaining party bases its standing upon the impairment of a private property or constitutional right. See Rottschaefer, *Constitutional Law* (1939), pp. 69-70. Indeed, no other conclusion is permissible.

For if respondents herein should prevail in their assertion as to lack of jurisdiction, the JAFRC is remediless in the face of action which has concededly awful and devastating consequences upon constitutional rights of the JAFRC. It cannot sue in libel; no provision is made by the Order for a hearing before the Attorney General or anyone else for corrective purposes; nor does the political arena offer a real prospect of relief for the JAFRC and other listed organizations, especially since the actions of respondents, in labeling those organizations

as "subversive," have the intended and actual effect of diminishing or destroying any efficacy among the electorate that such organizations might possess. Cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4. "Were this case to be not justiciable," executive action stigmatizing an entire organization "could never be challenged in any court. Our Constitution did not contemplate such a result." *United States* v. *Lovett*, 328 U. S. 303, 316.

Nor does the danger inherent in a finding that the question of the constitutionality of action under the Executive Order is non-justiciable end with the JAFRC and the other proscribed organizations. Part III, Section 3 and Part V, Section 2(f) of the Order may now allow, or could be amended to permit, the Attorney General to list religions or races as well as organizations. Of course Article VI, clause 3 as well as the Due Process Clause of the Fifth Amendment of the United States Constitution might thereby be infracted even more clearly than constitutional prohibitions are violated by the Order as it now stands. But justiciability and reviewability are not predicated upon the decree of unconstitutionality. If this Court is unable to consider the constitutionality of the present Order, it would be unable to consider the constitutionality of the hypothesized order. It is respectfully submitted that respondents may not escape judicial inquiry into the authority which they have asserted. Otherwise, the process of judicial review, which in this country is the cornerstone of constitutional government, may be circumvented upon every occasion when officials conceive some ingenious or novel mode of wielding power.

F

The Complaint States a Cause of Action for Which Relief Is Available

The Court below held that the circumstance that the designation of the JAFRC "was disclosed to the public press presents no legal ground for relief" since "in the absence of a statute imposing secrecy, it cannot be supposed that the Courts have any power to regulate or control publication of matters concerning the government's business" (R. 39).

That there must be some limits to the use of the prestige and power of high public office to stigmatize individuals and organizations is plain. The Constitution places safeguards about stigmatizing official judgments (see p. 56, *supra*), yet only with respect to "Speech or Debate in either House" is it provided that "Senators and Representatives . . . shall not be questioned in any other place" (Article I, Sec. 6, Cl. 1). Of course, good reasons may be advanced for exempting public officials from liability in damages for matter spoken or written in connection with the performance of their duties; ". . . it would be unfortunate if all government officers were deterred from acting in doubtful cases by fear of later personal liability. . . ." Gellhorn & Schenck, "Tort Actions Against the Federal Government" 47 *Columbia Law Rev.* 722, 724. But the foregoing exemption has never been extended beyond actions for money damages. *Spaulding* v. *Vilas*, 161 U. S. 483; *Mellon* v. *Brewer*, 57 App. D. C. 126, 18 F. 2d 168, cert. den., 275 U. S. 530; *Jones* v. *Kennedy*, 73 App. D. C. 292, 121 F. 2d 40, cert. den., 314 U. S. 665; but see Gellhorn & Schenck, *op. cit. supra*, 738.

Groner, *C.J.*, has said of this exemption that "its cloak of absolute immunity offers such far reaching opportunity for oppression, that it manifestly ought not to be extended

beyond the impulse that gave it being" (*Glass* v. *Ickes*, *supra*, 117 F. 2d, p. 281). Thus, the inability to sue an officer of the Government in damages for matter written or spoken by him in connection with his duties does not preclude an action in equity where the matter written or spoken is widely disseminated and is utilized, as any other instrument of pressure available to government, to influence the activities of some individual or organization. For just as the inability to recover in damages from an official acting under an unconstitutional law* would, obviously, be no basis for denying injunctive relief against the enforcement of that law by that same officer,** so the inability of the JAFRC to recover damages from respondents is no basis for denying the relief here sought. Indeed, the absence of an adequate remedy at law is the necessary condition for this action in equity.

The absence of a remedy at law for damages; the non-penalizing effect of a suit in equity upon the free exercise of official discretion; and the need for enforcing limits to and responsibility for governmental pressures and compulsions which may be exerted through the medium of publicity*** all indicate that a cause of action in equity has here been stated.

In contrast with the ruling below, and in accord with petitioner's contention is the decision of this Court in *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56, where the Commission indicated that cost and price reports filed by the Utah Fuel Company would be made public at a hearing of the Commission. The Com-

* *Bohr* v. *Barnett*, 144 F. 389; see, also, *Anniston Manufacturing Co.* v. *Davis*, 87 F. 2d 773, 780, aff'd, 301 U. S. 337; *Gladstone* v. *Galton*, 145 F. 2d, 742, 744; Rottschaefer, *Constitutional Law* (1939), p. 36.

** In *Jones* v. *Kennedy*, 73 App. D. C. 292, 121 F. 2d 40, cert. den., 314 U. S. 665, acts and proceedings which had been previously held to be unconstitutional (298 U. S. 1) were deemed to be inadequate to found an action in libel.

*** See Note, 43 *Columbia Law Rev.* 837, 942-943.

mission's determination had been held non-reviewable (306 U. S., 58), but in the injunction proceedings thereafter instituted against the Commission to restrain the disclosure of the cost and price information this Court finally held that equitable relief against the action of the Commission was available.

> "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other relief, we think complainants could properly ask relief in equity" (306 U. S., 60).

Similarly, in *Bank of America National Trust & Savings Association* v. *Douglas*, 70 App. D. C. 221, 105 F. 2d 100, an injunction was granted restraining the Securities & Exchange Commission from publicizing certain information obtained by it from the Secretary of the Treasury. In writing for his Court, GRONER, *C.J.*, stated:

> "We think the court had jurisdiction. The Bank alleged that disclosure of the information would result in irreparable injury. Since other remedy was entirely lacking, the cause was a proper one for equitable relief" (105 F. 2d, 102).

G

Petitioner Has Standing to Raise the Issues Here Presented

The Court of Appeals held that the JAFRC has no standing to complain of the deprivation of First Amendment rights on the grounds that "Those rights are personal to the individual members" (R. 40). The Court below was in error when it thus held that an unincorporated association may not assert the substantive or procedural rights guaranteed by the Due Process Clause of

the Fifth Amendment. In *Grosjean* v. *American Press Company*, 297 U. S. 233, this Court held:

> "Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. *Paul* v. *Virginia*, 8 Wall. 168. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. *Covington & L. Turnip, Road Co.* v. *Sandford*, 164 U. S. 578, 592; *Smyth* v. *Ames*, 169 U. S. 466, 522" (297 U. S., 244).

Again, in *Bridges* v. *California*, 314 U. S. 252, the Court sustained the rights to freedom of speech and press, under the Due Process Clause of the Fourteenth Amendment, asserted by corporations which were parties to that action. And in *Hannigan* v. *Esquire*, 327 U. S. 146, the Court indicated that a corporation could assert and rely upon the prohibitions contained in the First Amendment against the abridgement of freedom of the press. *Hague* v. *CIO*, 307 U. S. 496, cited and relied upon below, does not establish that the petitioner herein has no standing to assert rights arising under the Due Process Clause of the Fifth Amendment for that case was a determination under the Privileges and Immunities Clause rather than the Due Process Clause of the Fourteenth Amendment.

Moreover, the basic premise that the petitioner is asserting some right of the organization as distinct from the rights of its members, contributors and supporters, is unsound. An unincorporated association has no identity separate and distinct from its membership. The organization rather than each of the members is denominated as party plaintiff for reasons of procedural convenience only and under the authority of Rule 17(b)(1) of the Federal Rules of Civil Procedure. The status of the organization for procedural purposes does not alter the substantive

law that an unincorporated association is the aggregate of its membership; the association has no rights beyond or different from those of its constituents. New York General Associations Law, Section 12. The corollary is that the association has the same rights that its members possess. For this reason, this organization could sue in libel in its organizational name. *Kirkman, etc.*, v. *Westchester Newspapers, Inc.*, 287 N. Y. 373; *Lubliner* v. *Reinlib*, 50 N. Y. Supp. 2d 786. Consequently, the rights here asserted are the rights of the various individual members and participants in the activities of the JAFRC. Since those members and participants could join in an action to eliminate restrictions upon their activities in violation of the Due Process Clause of the Fifth Amendment, it follows that the organization which may sue on their behalf may assert the same rights. *Alston* v. *School Board of City of Norfolk*, 112 F. 2d 992, 997.

CONCLUSION

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia to review its judgment.

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
Petitioner.

O. JOHN ROGGE,
BENEDICT WOLF,
Attorneys for Petitioner.

MURRAY A. GORDON,
ROBERT H. GOLDMAN,
JEROME J. BORNSTEIN,
Of Counsel.